No. 7681.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Toichi Tomikawa,
Claimant and Appellant,

American Oil Screw "Patricia," No. 970-A, her cargo, engines, tackle, apparel, furniture, etc.,
Respondent,

against

United States of America,
Libelant and Appellee.

BRIEF FOR TOICHI TOMIKAWA, CLAIMANT AND APPELLANT.

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STATEMENT OF CASE.

Nature of Appeal.

The appellant is a subject of Japan and the owner of the vessel "Patricia". On March 23, 1932, she was seized by the Coast Guard more than one hour sailing distance from the coast. On the return of the monition, he appeared specially, objected to the jurisdiction of the court,

and moved to quash the seizure on the ground the seizure was in violation of the Convention and Treaty between the United States and Japan. The evidence on that issue was heard in open court, and the motion was denied. Thereafter, the appellant filed an answer. Subsequently, the case was submitted on the merits upon the same evidence. The trial court made an order reciting that appellant is a subject of Japan, the owner of the vessel, she was entered as an *alien* vessel, paid *light money* and that the seizure was in violation of the Convention between the United States and Japan, proclaimed January 16, 1930, and thereafter made a decree dismissing the libel and directing the return of the vessel and cargo. Thereafter he set aside the findings and decree on libelant's motion. Subsequently, he made a decree of forefiture. The appeal is from the last named decree. The principal questions are twofold, (1) Was appellant entitled to the benefits of said Convention? (2) Was he entitled to the same treatment as a subject of Great Britain under the most favored nation clause of the Treaty between the United States and Japan of February 21, 1911? These questions are encompassed by other important questions relating to orders, findings made and refusal to find, too numerous to detail them here. They are stated under separate points.

Nationality of Appellant.

Appellant was born in Japan; his parents are Japanese; he is not a citizen of the United States; he is married and domiciles in Japan where he lives with his wife and child; he entered this country under a passport and temporarily resides at Terminal Island, California [R. pp. 51, 263, 264].

Nationality of Vessel.

In 1924, K. Uyeji and O. Uyemoto, Japanese, built a vessel at Terminal Island, California, and christened her "Patricia" [R. p. 134]. On July 16, 1930, they sold her to George Kioo Agawa, a Japanese [R. p. 134]. On March 13, 1930, Agawa sold her to appellant [R. p. 135]. The Collector of Customs, Marine Department, entered her in his records as an American built and Japanese owned vessel [R. pp. 134, 135], and entered said sales in his records [R. p. 134].

The Seizure.

On March 23, 1932, Frederick J. Dwight, Chief Boatswain's Mate, in charge of Revenue Cutter, No. 259, seized the vessel with her cargo on the high seas, and arrested appellant and his crew [R. p. 76], and then towed the vessel and cargo to the Coast Guard Base No. 27, at San Pedro, California [R. p. 83]. Dwight testified that the place of seizure was 10½ miles from the coast [R p. 75]. Appellant testified it was over 19 miles from the coast [R. p. 44]. The U. S. Attorney admitted that it was more than on hour sailing distance from the coast [R. p. 150].

The Libel.

On April 28, 1932, the then U. S. Attorney filed a libel of information against the *cargo* and vessel for alleged violations, (1) engaging in trade, and (2) refusing to produce a manifest for the cargo [R. pp. 5-9]. On the same day the court made an order for process to issue against the cargo and vessel [R. pp. 10-11]. On the same day, a monition was issued against the *cargo* and vessel [R. pp. 12-13].

Motion to Quash the Seizure.

Appellant appeared specially on the return of the monition [R. p. 31], filed a special notice of appearance [R. pp. 38-39], motion to quash the seizure [R. pp. 32-33] and a petition in support thereof [R. pp. 33-37]. The evidence on that issue was heard in open court [R. pp. 41-93]. There was a dispute as to the *place* where the seizure was made. Appellant and his witnesses testified that it was *19* miles from the coast and libelant's witnesses testified that it was between *10* and *11* miles from the coast. This dispute is unimportant because the U. S. Attorney, subsequently, *admitted* in open court that the seizure was made *"more than one hour's sailing distance from shore"* [R. p. 150]. The trial court directed the submission of briefs, and reserved decision on said motion [R. p. 94].

Additional Evidence on Motion.

Appellant moved to reopen the hearing, before said motion to quash was decided, and to permit him to file two affidavits, or, in lieu thereof, to examine the affiants in open court [R. p. 95]. The libelant consented to the filing of said affidavits [R. pp. 95-96]. The trial court reopened the hearing for that purpose, and directed the filing of said affidavits [R. p. 97]. The affiant Lambie averred as to the dimensions of the vessel [R. p. 97], and alleged that her maximum speed is 7.9 nautical miles per hour [R. p. 98]. The affiant Young averred as to the dimensions of the vessel [R. p. 98], and alleged that her maximum speed, loaded, is 7.6 knots per hour [R. p. 99].

Disposition of Motion to Quash.

The trial court, thereafter, overruled the objection to the jurisdiction of the court and denied the motion to quash the seizure with an exception to appellant [R. p. 99].

Answer to Libel.

On October 17, 1932, appellant filed an answer, in which he denied the material allegations of the libel of information, and set up *three* affirmative defenses, namely, (1) that the Collector of Customs had no authority or jurisdiction to number the vessel, (2) that the vessel was seized on the high seas more than one hour sailing distance from the coast, and was unlawful, and (3) that the master of the vessel did not proceed or intend to proceed to the United States, but was taking bearings to ascertain his whereabouts when the vessel was seized [R. pp. 15-22].

Ruling of Ultimate Question Involved.

On October 31, 1932, the case appeared on the calendar for setting. Appellant's proctor discussed the outstanding features on the motion to quash the seizure. The trial court answered that, from an examination of the record, *"We are convinced that the defendant owner of the boat did not know where his boat was"*, referring to the place of the seizure. He coincided with the proctors that the case be presented upon the same evidence taken on the motion to quash the seizure, and added, "We believe that ultimately the termination of this case involves a question of *law*, rather than of *fact*" [R. p. 100].

Motion to Dismiss Libel.

On December 5, 1932, the date set for trial, appellant moved to dismiss the libel of information on the ground that it did not allege the *place* where the seizure was made, and it did not show that the seizure was made within the limits of the jurisdiction of the court [R. pp. 101-102]. In a colloquy between the court and appellant's proctor, the court stated that he passed upon that objection [R. pp. 102-103], and appellant insisted that that *precise* question was not raised on the motion to quash the seizure, and was not passed upon by the trial court [R. pp. 103-104]. The trial court then asked the libelant's proctor whether he desired to amend the libel of information by reciting it, and he declined. Thereupon, the trial court denied the motion with an exception to appellant [R. p. 104].

Stipulation Submitting the Case.

The proctors for the respective parties stipulated in open court that the testimony taken on behalf of libelant on the motion to quash the seizure be deemed as the testimony taken upon the trial of the merits of the case, and that the testimony taken on behalf of appellant on the motion to quash the seizure be deemed as the testimony taken upon the trial of the merits of the case, including said affidavits [R. pp. 105-106].

Motion to Amend Libel.

Thereafter, the trial court granted libelant permission to amend its libel of information [R. p. 106], with the condition that all shall be deemed denied [R. p. 107].

Amended Libel.

On March 29, 1933, libelant filed an amended libel of information [R. p. 29], consisting of three counts, namely, (1) that the vessel was seized on the high seas at a point between 10 and 10½ miles southwest true from San Mateo Rocks off the coast of California, and at that time she was engaged in trade ; (2) alleged refusal to produce manifest, and (3) alleged knowingly and fraudulently using the number which the vessel was not entitled to [R. pp. 25-29].

Motion for Judgment.

Appellant moved for judgment as though it was made at the *close* of the whole case [R. p. 105] on the ground, among others, that the claimant was a subject of Japan and the sole owner of the vessel; that the vessel is deemed a foreign vessel; that the Collector of Customs had no power or jurisdiction to number the vessel; that the numbering of the vessel was of no legal force or effect; that there was no evidence that the vessel was in contact with any other vessel; that the vessel could not traverse within one hour distance from the place of seizure to the coast; that the vessel was incapable of traversing the distance in one hour and that appellant was entitled to the benefits of said Convention [R. pp. 108-112]. The trial court directed filing of briefs and reserved decision on that motion, stating that thereafter he would set the case down for oral argument [R. pp. 112-113].

Ruling Limiting Case to One Question.

On February 27, 1933, the case appeared on the calendar for the purpose of informing proctors whether the trial court desired to hear further argument and on what particular question and appellant's proctor called that to the attention of the trial court [R. p. 114]. The trial court then ruled that, "there are two main questions, one of which we are inclined to think has been disposed of by a recent decision of the United States Supreme Court (referring to *Cook v. United States,* 288 U. S. 102) to the effect that if this boat be regarded as a foreign vessel, then the fact that the place of seizure was more than one hour's sailing from the territorial waters of the United States would make the seizure illegal". The other question, he said, "was the numbering of the boat in effect a legal registration of it so as to make it a domestic vessel?" [R. p. 114]. He then ruled that *"the proof in this case indicates that it was seized at a point more than one hour's sailing distance"* [R. p. 115]. He suggested that to counsel and added "that leaves for further discussion the question,—did the fact that the Department gave this boat a number constitute it a domestic vessel?" [R. p. 115].

Ruling of Seriousness of Seizure.

On March 13, 1933, libelant moved to reopen the trial, for the purpose of introducing additional evidence [R. p. 116]. Appellant objected on the ground that the motion was not based upon papers [R. p. 117]. The trial court sustained that objection, and added: "The seizure of a vessel on the high seas is a serious matter, and the contention of the respondent that it involves a violation of a treaty with a friendly power only adds to the responsi-

bility resting upon the court to give consideration to only the facts and not when its attention is called to a situation that there is possibly some facts that have to bear upon the merits of the case not yet in the record" and continued the case to enable libelant to serve a written application [R. p. 119].

Renewal Motion to Reopen Trial.

On March 24, 1933, libelant renewed his motion to reopen the trial [R. p. 120] for the purpose to examine the Japanese Vice Consul, in order to prove that the vessel was not registered with the Japanese Government [R. p. 122]. Appellant stipulated that the vessel was not registered, licensed, or documented by the Japanese Government [R. p. 123]. The trial court did not accept that stipulation [R. pp. 124-125].

Libelant's Additional Evidence.

The trial was reopened and libelant called as its witness Kakichi Ozawa, the Vice Consul of Japan [R. p. 126]. He said that he did not study all the laws of Japan but only the Civil and Criminal Codes and Political Science [R. p. 126]. He said that he brought with him the laws concerning Japanese ships, published by the Bureau of Communication of Japan [R. p. 127]. He said that Article V provided that an owner must register the vessel at the Government's office of the port which has the jurisdiction, and the name cannot be changed [R. p. 130]. He also testified that he brought with him an indicia of all Japanese vessels, published by the Department of Communication of Japan [R. p. 130]. The trial court then

desired to know the history of the vessel [R. pp. 130-133]. The examination of that witness was suspended for that purpose [R. p. 133].

Vessel's Number and Payment of Light Money.

Appellant called Carl O. Metcalf as his witness and he testified that he was the Chief Clerk of the Collector of Customs, Marine Department since 1916 [R. p. 134]. He produced three cards showing that between July 12, 1924, and March 13, 1932, the vessel was given the number "970-A" to the owners [R. pp. 134-135]. He also produced a book called "Alien-owned and American-built Vessels", in which this vessel was entered as an *"American built and alien Japanese owned vessel"* and showed that she paid *"light money"* from July 12, 1924, to March 13, 1932 [R. pp. 135-148].

Continuation Ozawa's Testimony.

The witness Kakichi Ozawa was recalled, and he testified that the Japanese Government assumed responsibility for vessels named in the book, and that *"other* rules of our Government must make protection of the Japanese subject and the Japanese vessels when they are out of the County" [R. p. 148]. He said that the book did not contain vessels owned by Japanese in *foreign* countries [R. p. 149].

Admission of Place of Seizure.

The trial court stated that he was inclined to the view that if the vessel was an alien vessel, that under the decision in *Cook v. United States,* 288 U. S. 102, the seizure "would be regarded as unlawful", and that the remaining

question was, "Is the vessel to be regarded as an alien boat?" [R. p. 150]. He then stated, "We understand" that it is not disputed that the vessel was *"seized more than one hour's sailing distance from shore"* and the U. S. Attorney replied, *"No, Your Honor"*. The trial court then stated that he found himself very much "in doubt upon that question and is inclined to believe that the laboring oar, so far as convincing the court is concerned, *still rests with the Government"* [R. p. 150].

Ruling Collector's Records Persuasive.

The trial court, in commenting upon Metcalf's testimony, said that the records produced by him were *"persuasive"* to the extent of showing that the Collector of Customs. Marine Branch, *"one branch of the Government has treated the vessel in question as a foreign boat"*, and added that "the only basis for asserting jurisdiction here arises out of the circumstances with the numbering of this vessel", and then said that "when we come to inquire into the records of that department, we find that in so dealing with this boat their activities were with the view of dealing with a *foreign* vessel and not with a vessel either belonging to a citizen of the United States or registered or licensed under the laws of the United States or amenable to its jurisdiction, except to the same extent and no further than any other alien vessel" [R. pp. 151-152]. He said that he mentioned all that "in order that the Government's counsel may be apprized of the trend of thought on the part of the court and indicate the point respecting which any additional authority, if presented, should be directed" [R. p. 152]. The trial court then inquired of the libelant's counsel whether "we in sub-

stance, at least, stated the Government's position", and the proctor for libelant replied, *"Yes,* Your Honor. I think that the court and Government counsel are entirely in accord on the question to be covered by the law" [R. p. 152].

Admission Numbering Vessel Was Unlawful.

On March 24, 1933, the case came up for argument. The proctor for the libelant stated that if the "Patricia" is a Japenese vessel, she is "within the protection of this treaty", and added, "then I believe that (appellant's) counsel's point as to the jurisdiction is well taken under the Cook case" [R. p. 154]. He then called the trial court's attention to the *"exchange of notes"* attached to said Convention between the United States and Japan of January 16, 1930, 46 U. S. Stat., at page 2449, which reads in part as follows, to-wit: "It is understood—1. That the term *'private vessel',* as used in the Convention, signifies all classes of vessels other than those owned and controlled by the Japanese Government and used for Governmental purposes, for the conduct of which the *Japanese Government assumes full responsibility."* (Italics ours.) He then argued "that the private vessels must be under the Japanese flag" [R. p. 156]. He contended that because "there was no flag of any kind on board of the 'Patricia', nor had she ever displayed a flag", and because there "is no assumption of responsibility on the part of the Empire of Japan for the operations and activities of this vessel," and although the vessel was "owned by a Japanese in the United States", the vessel was not entitled to the benefit of the treaty [R. pp. 156-158]. However, he frankly *admitted* that "in my opinion, that pro-

cedure, that method of handling alien-owned boats, has grown out of lack of knowledge of the navigation laws on the part of the clerical force which has been given the authority to execute those laws. *I have been unable to find any authority for their issuing a number to a vessel owned by an alien"* [R. p. 159], and avowedly *admitted* that *"when the Collector of Customs does issue a number to this boat, if in fact it is a foreign boat, I think he exceeds his authority"* [R. p. 160].

Order Dismissing Libel.

On March 30, 1933, the trial court made an order reciting that the vessel was seized at a point between 10 and 11 miles from the coast; that her maximum speed was not exceeding 8 miles per hour; that she is owned by a subject of the Empire of Japan; that she is undocumented; that the Collector of Customs allotted a number to her *"as an alien vessel";* that she was subjected to and required to pay light money; and that "the court finds said vessel was seized in *contravention* of the treaty entered into between the United States and Japan, and upon the authority of *Cook v. United States,* 288 U. S. 102, he adjudged and ordered that the order heretofore made denying the motion to quash and dismiss the proceedings be vacated, and that "the libel against said vessel, its equipment and cargo, is dismissed, and directed the proctor for appellant to prepare and serve a decree in conformity therewith" [R. p. 161].

Findings of Fact Dismissing Libel.

The trial court made the following findings of fact: that the vessel was seized on March 23, 1932, on the high seas at a point between 10 and 11 miles off the coast (Find. I); that she was towed to the Base in the Harbor of Los Angeles (Find. II); that the Collector of Customs adopted the seizure (Find. III); that subsequently the Collector of Customs caused the appraisal of the vessel and cargo (Find. IV); that on April 28, 1932, the United States Attorney, at the request of the Collector of Customs, instituted this libel against the cargo and vessel (Find. V); that at the time of the seizure, the vessel bore the number "970-A" (Find. VI); that the vessel was built in 1925 by Japanese at Terminal Island, California, for citizens of Japan (Find. VII); that up to the time appellant acquired title of the vessel, she was continuously owned by a citizen of Japan (Find. VIII); that about March 15, 1932, appellant purchased the vessel and is the sole and exclusive owner (Find. IX); that appellant is an alien and a citizen of the Empire of Japan (Find. X); that the measurements of the vessel are 82 feet, length; 18.5 feet, breadth; 8.75 feet, draft loaded, and equipped with a Fairbanks-Morse Engine, 1924, 100 horsepower, and her maximum speed is 7.9 nautical miles per hour (Find. XI); that at the time of the seizure there was no other vessel in contact with her and that she could not traverse within one hour from the place of seizure to the nearest coast (Find. XII); that the Collector of Customs entered her as an *alien* vessel and she was subjected to and required to and did pay light money since she was built (Find. XIII); that at the time and place where she was seized, she did not violate any of the laws of the

United States (Find. XIV); that she is not an American vessel (Find. XV); that she did not violate Section 4377, R. S., 46 U. S. C. A. 325 (Find. XVI); that the failure to produce the manifest was not a violation of Section 584 of the Tariff Act of 1930, 19 U. S. C. A. 1584 (Find. XVII); that appellant did not knowingly and fraudulently use the number allotted to the vessel (Find. XVIII); that the seizure was made in contravention and in violation of the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat., 2446-2449 (Find. XIX); and that the libelant failed to prove by credible evidence the allegation of the libel of information (Find. XX) [R. pp. 162-166].

Conclusion of Law Dismissing Libel.

The trial court found as conclusions of law that from the time the vessel was built she was an alien owned American-built vessel (Con. A); that by the collection of light money and the entry in the books of the Collector of Customs that the vessel was an alien owned vessel, the libelant well knew at the time of the seizure that she was an alien owned vessel (Con. B); that the seizure was in contravention and in violation of the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat., 2446-2449 (Con. C); that the seizure was unlawful, illegal and in violation of law (Con. D); that appellant is entitled to judgment directing that the minute order of October 13, 1932, overruling his objection to the jurisdiction of the court and denying the motion to quash be annulled, vacated and set aside; that each of the counts of the libel be dismissed upon the merits; that appellant was entitled to the return of the vessel and her

cargo; and that, upon the service of a certified copy of the decree, the commandant of the Coast Guard Base deliver the vessel to appellant to make an examination as to her seaworthiness and repairs if necessary, and thereafter, he shall, at his own cost and expense, return the cargo, and place it on board of the vessel, and permit her to proceed on the high seas, and assign a convoy to accompany her on the trip to protect her from seizure, in order that she may safely arrive at the place of seizure, and then to permit her to proceed on the high seas wherever she may desire to go without any hindrance, interference or molestation [R. pp. 167-169].

Decree Dismissing Libel.

The decree is dated June 28, 1933, and was recorded on June 29, 1923 [R. p. 172], and follows the conclusions of law and directs that the libel be dismissed upon the merits [R. pp. 170-172].

Libelant's Motion to Vacate Decree.

Thereafter, the libelant presented a motion to vacate the final decree and the findings of fact and conclusions of law, upon the ground that the evidence did not support the findings of fact and conclusions of law, and that the conclusions of law are contrary to law [R. pp. 173-174].

Answer to Libelant's Motion to Vacate Decree.

Appellant filed an answer alleging that the motion to vacate the decree was in effect for a *"new trial"* and cannot be entertained because there is no *statute* providing

for such relief, and that the findings of fact are supported by an overwhelming amount of evidence, and that the conclusions of law are not contrary to law [R. p. 175].

Orders Vacating Decree.

On August 21, 1933, the trial court made an order reciting that it appearing that the time to *appeal* from the decree would likely expire before a decision may be made upon the motion to vacate the decree, he directed that the findings of fact, conclusions of law and decree be vacated, and set the case down for October 2, 1933, for further hearing [R. p. 176].

(NOTE: The time to appeal would not have expired until September 29, 1933, which was one month and eight days from the date of said order.)

On September 15, 1933, the trial court made an order modifying said order, reciting that the cause was continued for further argument on the merits with particular reference to the question whether the vessel is entitled to the benefits of the Convention between the United States and Japan of January 16, 1930 [46 U. S. Stat. p. 2449; R. p. 177].

Ruling Changing Burden of Proof.

On October 2, 1933, the trial court, after reading his order of August 21, 1933, stated that "but for the Treaty the Government was entitled to proceed as it had done in this case" [R. p.181]. He said that it was his thought that this case "came within the accepted class defined" by the *Cook* case, and added that further reflection raised the question that the *Cook* case was interpreting and ap-

plying the treaty between the United States and Great Britain, "the language of which, however, is substantially the *same* as the language of the Treaty with Japan and the purpose of each of these two treaties was identical" [R. p. 182]. He stated that the libelant advanced the contention that except for such a treaty, it was entitled to proceed in the manner in which it had, and that "the labor is upon the party *claiming* the benefits of the exception contemplated by the Treaty" [R. p. 182]. He further stated that there was considerable force in the Government's contention, and that "it is incumbent upon the *respondent* to show that under the record, as we have it here, this respondent is entitled to the benefits of the Treaty" [R. p. 182]. That ruling is directly contrary to his previous ruling that the burden was on the libelant [R. p. 150].

Exceptions to Orders Vacating Decree.

Appellant called attention that the trial court did not grant appellant *exceptions* to the orders made on August 21, 1933, and September 15, 1933, and asked that exceptions be entered in the minutes of the court *nunc pro tunc* as of said dates [R. pp. 182-183] and the trial court granted that request [R. p. 183].

Motion to Vacate Orders Vacating Decree.

Appellant moved to set aside said orders which vacated the decree on the ground, among others, that they were made without authority in law and contrary to precedence; that the precise question was passed upon by the trial court *several* times before the decree dismissing the libel was entered; that the judgment in the criminal action

which he made and of which he would take judicial notice was in effect an acquittal, and was therefore *res adjudicata* on the points involved [R. pp. 184-187]. The trial court directed to file briefs and reserved decision on said motion [R. p. 188].

Order for Forfeiture.

On April 6, 1934, the trial court made an order reciting, among other things, that appellant is a subject of the Empire of Japan and the owner of the vessel; that she was built in the United States; that for several years prior to the seizure, appellant maintained a home and was domiciled in the United States, and directed forfeiture on Counts 2 and 3, and dismissed Count 1, and directed that the findings and decree be prepared in conformity therewith [R. pp. 178-180].

Appellant's Proposed Findings of Fact.

On May 16, 1934, appellant submitted proposed findings of fact and conclusions of law requesting the trial court to find [R. pp. 190, 208] as follows: That in 1924, K. Uyeji and O. Uyemoto, citizens of Japan, built the vessel at Terminal Island, California (Find. 1); that the Collector of Customs entered her in his book as an American built and alien Japanese owned vessel and allotted her the number, "970-A" (Find. 2); that on July 11, 1930, the said K. Uyeji and O. Uyemoto sold said vessel to George Kioo Agawa, a citizen of Japan, and the Collector of Customs entered said sale in his book and allotted her said number (Find. 3); that on March 13, 1932, said George Kioo Agawa sold said vessel to appellant, a citizen of Japan, and the then Collector of Customs en-

tered said sale in his book and allotted her said number (Find. 4); that the measurements of said vessel are 82 feet length, 18.5 feet breadth, 8.75 feet draft loaded, and at the time of the seizure she was equipped with a Fairbanks-Morse Engine of 1924 of 100 horsepower (Find. 5); that her maximum speed at the time of the seizure was 7.9 nautical miles per hour (Find. 6); that between July 12, 1924, and March 18, 1932, said owners paid "light money" to the Collector of Customs, which he demanded (Find. 7); that on March 23, 1932, the revenue cutter CG-259 of the United Section Base 17, was on the high-seas in search of a reported capsized vessel and overtook the "Patricia" and noticed that she was loaded below her water-mark and he then placed a seaman, first class, on board, and later searched her without a warrant or other process and when he got on board, he opened her hatchways and found that she was loaded with sacks containing spirituous liquors and thereupon, he arrested appellent and his crew and seized the vessel and cargo (Find. 8); that at the time of the seizure, the vessel bore on her stern the number "970-A", and the letters "L A" (Find. 9); that the vessel was seized between 10 and 11 miles southwest true from San Mateo Rock off San Juan Point, California (Find. 10); that the place of seizure was ascertained by dead reckoning, running from the position where the revenue cutter started at point of San Clemente Island in search of the reported capsized vessel (Find. 11); that at the time of the seizure, there was no vessel or vessels near her or anywhere in sight of her (Find. 12); that the vessel could not sail under her own power within one hour from the place of seizure to San Mateo Rocks off San Juan Point, which was the nearest point of land of the

United States (Find. 13); that after the vessel was seized, she was towed to Section Base 17, San Pedro, California (Find. 14); that after the vessel was at said Base, under said seizure, the Collector of Customs, District No. 27, adopted said seizure (Find. 15); that thereafter the said Collector of Customs took possession and custody of the vessel and her cargo (Find. 16); that thereafter the vessel was appraised in the sum of $8,000.00 and the cargo in the sum of $17,490.00 (Find. 17); that on or about April 28, 1932, the United States Attorney, upon the request and instructions of said Collector of Customs, instituted this libel proceeding against the vessel and her cargo (Find. 18); that at the time of the seizure, there was a fog and the vessel drifted in order to enable its master to ascertain his whereabouts and get his bearings (Find. 19); that the said Dwight, in charge of said revenue cutter, did not have a search warrant or any other process authorizing him to go on board of said vessel and search her (Find. 20); that appellant is an alien and a citizen of the Empire of Japan, and incapable of becoming a citizen of the United States (Find. 21); that appellant's domicile is in the City of Nishinomiya, Province of Hyogo, Japan, where he domiciles with his wife and son, and temporarily resides or sojourns at Terminal Island, California (Find. 22); that the treaty between the United States and Japan proclaimed April 5, 1911, 37 U. S. Stat. 1504-1509, provides that the citizen or subject of Japan shall enjoy the most-favored nation treatment in the territories of the United States (Find. 23); that the Convention between the United States and Japan proclaimed January 16, 1930, 46 U. S. Stat. 2446-2449, provides that the seizure shall not be made unless she can traverse

within one hour from the place of seizure to the nearest coast of the United States (Find. 24); that the seizure took place on the high seas outside of 3 marine miles from the coast of the United States (Find. 25); that the Collector of Customs had no power or jurisdiction to allot and give said vessel said number, and that the giving of said number did not attach to her the same dignity as would have been the case if her owner had been a citizen of the United States (Find. 26); that appellant appeared specially and made an application to set aside the seizure on the ground, among others, that the seizure was illegal, unlawful, and that the court did not acquire jurisdiction for the reason that appellant was a subject of Japan and her nationality is deemed that of her owner (Find. 27); that the issues raised on the application to set aside the seizures was tried in open court and witnesses were examined and cross-examined, and resulted in making of a minute order overruling said objection (Find. 28); that on May 4, 1932, the Grand Jury indicted appellant and his crew. That thereafter he appeared specially and objected to the jurisdiction of the court and moved to quash said indictment upon the ground, among others, that his arrest was illegal, unlawful and inviolation of said Convention; that application resulted in a minute order denying said application; that thereafter, appellant moved, upon the testimony and proceedings had in this proceeding for a rehearing of said application to quash said indictment, and that application was granted and the said indictment was quashed, and that a judgment was entered thereon and the time within which to appeal therefrom had expired, and no appeal was taken and said judgment is in all respects final and conclusive (Find. 29); that appellant

requested the trial court to take judicial notice of the order and judgment entered in the said criminal action, which was a bar in this proceeding on the issue that the seizure was illegal, unlawful and in violation of said Convention (Find. 30); that on or about June 28, 1933, the trial court made said findings of fact and conclusions of law and said decree dismissing the libel upon the merits, and directed the return of the vessel and cargo to appellant (Find. 31); that the trial court made a minute order on August 21, 1933, which was modified by the minute order of September 15, 1933, vacating said findings of fact and conclusions of law and decree, and continued this cause for further hearing on the merits as to whether the vessel is entitled to the benefits of said Convention (Find. 32); that on January 29, 1934, appellant moved to dismiss the libel on the ground that on December 5, 1933, the 21st Amendment to the Constitution of the United States was proclaimed which repealed the 18th Amendment of the Constitution, and by reason thereof, the libel abated that the court had no jurisdiction (Find. 33). [R. pp. 191-201.]

Appellant's Proposed Conclusions of Law.

The appellant requested the trial court to find conclusions of law [R. pp. 190, 208, 202] as follows: That when the vessel was built her nationality was Japanese (Con. A); that appellant, by purchasing the vessel, became her sole and exclusive owner (Con. B); that appellant is a citizen of the Empire of Japan (Con. C); that when appellant became the owner of the vessel, her nationality was that of appellant (Con. D); that the Collector of Customs, in entering the vessel as an American

built and alien Japanese owned vessel, precluded libelant from disputing that fact (Con. E); that the Collector of Customs, in demanding and receiving annually light money, precluded the libelant from disputing the fact that her nationality is Japanese (Con. F); that the statute authorizing the giving of a number to a vessel contemplated and was intended to apply to vessels owned exclusively by citizens of the United States and not to an American built and alien Japanese owned vessel (Con. G); that the Collector of Customs had no right or authority to give the vessel said number (Con. H); that the giving of said number to said vessel did not attach any dignity to her nor convert her into a vessel of the United States (Con. I); that the number on the vessel and the letters "L A" painted did not attach any dignity to her nor signify that she was a vessel of the United States as contemplated by law (Con. J); that appellant's domicile in Japan was not changed by his residence within the United States (Con. K); that appellant's residence within the United States is deemed temporary and not permanent (Con. L); that the fact that the vessel was loaded below her water-mark did not empower or authorize to go on board her and search her without a warrant or process (Con. M); that the search of the vessel was in violation of the 4th and 5th Amendments of the Constitution of the United States (Con. N); that the search of the vessel without a warrant, and her seizure were null and void, illegal and unlawful (Con. O); that the search and seizure outside of 3 marine miles from the coast constituted a violation of Article I of said Convention (Con. P); that the search and seizure of said vessel on the high seas was in violation of Article II of said Convention, because the

vessel was incapable of sailing under her own power within one hour from the place of seizure to the nearest point of land of the United States (Con. Q); that the flying of a flag is merely notice to which nationality the vessel belongs but is not evidence of that fact (Con. R.); that the failure of the vessel to fly the Japanese flag did not authorize the boarding her nor justify her seizure (Con. S); that the nationality of the owner of the vessel and not the flying of a flag determines her nationality (Con. T); that all proceedings based on said search and seizure are null and void, contrary to law, and are of no legal force or effect (Con. U); that the adoption of the seizure by the Collector of Customs is null and void and of no legal force or effect (Con. V); that all proceedings based upon the adoption of the Collector of Customs are null and void and of no legal force or effect (W); that the said judgment in the criminal action precluded libelant from disputing the nationality of said vessel as being a Japanese vessel (Con. X); that appellant did not violate any Statute or law of the United States which subjected him to the payment of a penalty (Con. Y); that appellant, at the time of the seizure, did not violate any Statute or law of the United States which subjected him to the payment of a penalty (Con. Z); that the vessel did not violate any Statute or law of the United States which subjected her to the payment of a penalty or condemnation or forfeiture (Con. AA); that the vessel, at the time of the seizure, did not violate any Statute or law of the United States which subjected her to the payment of a penalty or condemnation or forfeiture (Con. BB); that upon the adoption of the 21st Amendment to the Constitution of the United States, which

repealed the 18th Amendment, this action abated, and thereby arrested the jurisdiction of this court, except to order this action to be dismissed with direction to return to appellant the vessel and cargo (Con. CC). [R. pp. 202-207].

Ruling on Proposed Findings.

On August 10, 1934, the trial court made an omnibus ruling refusing to find each and all of the appellant's proposed requests "except that the same are already incorporated in the findings and conclusions signed and filed on the date of August 9, 1934," with an exception to appellant [R. p. 208].

Order on Settlement of Findings.

On August 2, 1934, the trial court made an *ex parte* order reciting that appellant questioned some of the findings proposed by libelant as being unsupported by evidence; that the libelant was prepared and desired to submit evidence upon the matter that the Collector of Customs did not request to libel the cargo; that no claim was filed with him for the cargo; that he destroyed the cargo except 5 cases he retained as evidence; that the U. S. Marshall did not arrest or attach the cargo and that no claim was ever filed for the cargo, and vacated the submission and set the cause down for further hearing [R. pp. 209-210].

Exception to Order on Settlement of Findings.

On August 7, 1934, appellant requested that he be granted an exception *nunc pro tunc* as of August 2, 1934, the date when said order was made, and the trial court granted that request [R. p. 211].

Motion to Vacate Order on Settlement of Findings.

Appellant moved to set aside the order of August 2, 1934, upon the ground that the matters recited therein were not *issues* raised by the pleadings, and for that reason, the evidence could not be taken [R. pp. 211-212]. The trial court denied said motion with an exception to appellant [R. p. 212].

Libelant's Evidence on Settlement of Findings.

The libelant called as its witness Charles W. Salter, Assistant Collector of Customs since June 22, 1925 [R. p. 212]. He produced two documents, purporting to have been made by Frederick J. Dwight, the seizing officer. These documents were on "Customs Form 5955." One is numbered 11,799 [Exhibit 2, R. pp. 219-222] and the other is numbered 11,800 [Exhibit 1, R. pp. 214-216]. They are substantially alike, except they bear different notations, presumably made by other persons than the seizing officer [R. pp. 219-222, 214-216]. They both contain a pencil notation *"Jap 970 A"*, indicating that he seized a *Japanese* vessel [R. pp. 216-222]. They were received in evidence over appellant's objection and exception [R. pp. 213, 217]. Salter testified that he sent a copy of report "11,800" with a letter to the then U. S. Attorney [R. p. 224]. The letter was received in evidence over appellant's objection and exception [Exhibit 3, R. pp. 224-225]. The letter requested the then U. S. Attorney to institute a libel proceedings against one *"American* Oil-Screw Patricia" for violation of "R. S. 4337, 4377, and Sections 584 and 593 of the Tariff Act" and made no specific mention of the cargo [R. pp. 225-226]. The naming her as an *"American"* was a deliberate *false* state-

ment because he knew or should have known that she was entered and numbered in his office as an *"alien Japanese"* vessel and paid *"light money"* for eight years [R. pp. 133-148, 151-152, 161]. The libelant then read into the record the U. S. Marshal's return of the monition over appellant's objection and exception [R. pp. 226-228]. Salter *admitted* that the cargo was turned over to the Collector of Customs for safe keeping [R. p. 228]. The libelant then offered in evidence a letter dated July 28, 1933, addressed to the *successor* of the U. S. Attorney [R. pp. 229-230]. Appellant objected to the introduction in evidence of that letter on the ground, among others, that it was *"a self serving declaration."* That objection was overruled with an exception to appellant, and the letter was received in evidence [Exhibit 4, R. pp. 230-234]. Salter, in that letter, stated that it was a *"memoranda relative to the facts concerning the seizure"* [R. p. 230], but a cursory persual will show that it is in fact a *accusation* against the former U. S. Attorney, and an attempt to justify the *unlawful* destruction of the cargo. It is not alone misleading, but the charge made against the former U. S. Attorney is false. Salter, in that letter, stated that the former U. S. Attorney erred in instituting this libel against the *cargo* and vessel, but that it should have been against the vessel alone [R. p. 233]. That is a *false accusation.* The Statute made it *mandatory* upon the former U. S. Attorney to file a libel against both the *cargo* and vessel (Point 17, p. 71, *infra*). He stated in the letter that the cargo "never came into the custody of the court" [R. p. 234]. That is also a false statement because he knew or should have known that the Statute *commanded* the Collector of Customs

that the cargo *"shall be placed and remain"* in *his* custody to *"await disposition according to law"* (§605 Tariff Act 1930; 46 U. S. Stat., Part I, p. 754; Point 40, pp. 115-117, *infra*). Salter, in that letter also stated that before he ordered the destruction of the cargo, he *communicated* with the then U. S. Attorney "with a view to determining what quantity, if any, was desired by that officer to be held as evidence" [R. p. 232], but failed to produce the *"communication"* to substantiate that statement. It is needless to say that the former U. S. Attorney was a man well learned in the law, as that is undoubtedly known to this court. He surely would not advise the Collector to destroy the cargo pending this libel proceeding, and thus *violate* the express provisions of the Statute, and the accusation against that learned gentleman by innuendo is unworthy of consideration, if not censurable. Salter, in that letter, further stated that the cargo *"was disposed of in accordance with the law"* [R. p. 234]. That statement is likewise false, because the cargo could only be destroyed by a provision in the *decree made upon request of the Secretary of the Treasury* (§619 Tariff Act 1930, 46 U. S. Stat., Part I, p. 755; Point 40, pp. 115-117, *infra*). These misleading statements and false accusations were evidently made by Salter in the hope that the trial court would believe it as true, and thus open an avenue to the Collector of Customs justifying the destruction of the cargo in violation of the Statute. It will be noted that previously Dwight testified that he made *one* seizure, that is to say, of the vessel and everything on board, including the cargo [R. p. 76]. Salter, on cross-examination *admitted* that the cargo was seized simultaneously with the vessel, and that he gave orders to remove it

and place it in a warehouse [R. pp. 236-237]. He was asked whether or not it was a fact that Dwight made one seizure. The trial court characterized that question, and remarked that it was perfectly obvious that he did not know that, although on direct examination Salter was permitted to testify over appellant's objection and exception that there were *two* seizures made [R. p. 217]. Salter admitted that between certain dates he learned of the pendency of this proceeding [R. pp. 252-253]. The trial court characterized the inquiry and stated that counsel would be permitted to bring out facts, but *"not to conduct a school of instructions"* [R. p. 253]. It is very obvious that the trial court either overlooked or ignored that he permitted libelant to introduce in evidence the letter dated *July 8, 1933,* in which Salter made *ex parte* declarations intending to convey the fact that there were two *separate seizures* [R. pp. 230-234]. It will not be amiss to call attention that the trial court later remarked that he will not be *governed* by the statements of Salter's letter [R. p. 254]. It is significant to note at this point that the trial court made a very *important* finding based on that letter, namely, that the Collector of Customs requested the then U. S. Attorney to file a libel against the vessel and not the *cargo* [Find. V, R. p. 313]. It is also significant to note at this point that the trial court made a very important *conclusion* of law based on that letter, namely, that the cargo *"did not come within the jurisdiction of this court, in this libel proceeding and was rightfully and lawfully disposed of"* by the Collector of Customs [Con. I, R. p. 319]. The present U. S. Attorney who succeeded the former U. S. Attorney, *admitted* that the cargo was destroyed *without* an order of the court [R. p. 256]. Thereupon, the libelant rested [R. p. 258].

Appellant's Evidence on Settlement of Findings.

Appellant offered in evidence the judgment-roll in said criminal action. Libelant objected on the ground that it was immaterial and no proper foundation was laid. Appellant's proctor stated that he called the court's attention to that judgment in several briefs and asked the court to take judicial notice thereof, and pressed his offer. The trial court sustained the objection with an exception to appellant [R. p. 258]. The judgment-roll was then marked for identification as Exhibit A [R. p. 258] and a narrative statement thereof is in the Apostles on Appeal [R. p. 259]. It shows in substance that appellant and his crew were indicted on three counts. They appeared specially, objected to the jurisdiction of the court, and moved to quash the indictment, and that motion was denied. Subsequently, appellant moved to set aside that order and reopen the motion to quash the indictment, which was based upon the evidence taken on the motion to quash the libel in *this* proceeding, and the order directing the dismissal of the libel, and that motion was granted and an order entered thereon *quashing* the indictment, and subsequently a judgment was entered accordingly [R. p. 259].

Evidence of Appellant's Domicile.

Appellant was called as a witness in his own behalf [R. p. 263]. He testified that he was the claimant in this proceeding; that he was born on December 1, 1891, in the City of Osaka, Japan; that his parents were Japanese; that he is not a citizen of the United States; that he entered this country on May 13, 1929, from Yokohoma, Japan, under a passport, which he produced

in court; that he was married 13 years ago in Japan; his wife's name is Sumi; that they have one child, a boy named Hiroshi; that he lives at No. 90 Ikadcho, in the City of Nishinomiya, province of Hyozo, Japan [R. p. 263]. He was asked whether that was his domicile, and he answered in affirmative. Thereupon, the trial court, on his own motion, struck out his answer, and stated, "What is or is not a domicile, under this proceeding becomes a question of *law*" [R. p. 263]. He then testified that that was his home where he lived [R. p. 263], and that is where his family lived for over 11 years; that he stayed in San Pedro for about 5 years since he came from Japan [R. p. 264]. He said that his *permanent* home was in Japan, and that he was *temporarily* living at San Pedro [R. p. 264].

Evidence Elicited by Trial Court.

The trial court then interrogated the witness at great length [R. pp. 265-275], upon the matters recited in the order dated August 2, 1934, made on the settlement of the findings [R. pp. 209-210], the title to the vessel, the voyage when the vessel was seized, the seizure of the vessel and his claim to the cargo [R. pp. 265-275].

Specification of Errors.

The appellant assigned *100* errors on this appeal [R. pp. 328-355]. To recite them here would unduly prolong this brief. The appellant, in the first paragraph after the heading of each point, referred to the error of the point it relates. This was done for the sake of brevity and for the convenience of the court. It is hoped that will meet with the approval of the court.

POINT 1.

It Is Undisputed that Appellant's Nationality Is Japanese.

The *undisputed* evidence is that appellant was born in Japan; his parents were Japanese; he is not a citizen of the United States and entered this country under a passport [R. pp. 51, 263].

The trial court found as a fact based on that evidence, that appellant is *"a subject of the Empire of Japan"* [Find. XII, R. p. 315].

The place of *birth* determines the nationality of the person.

> *United States v. Wong Kim Ark,* 169 U. S. 649, 656.

The evidence that appellant was born in Japan raised the presumption that he is a subject of Japan.

> *Hauenstein v. Lynham,* 100 U. S. 483.

That presumption continues "until a change of nationality is proved."

> *City of Minneapolis v. Reum,* 56 Fed. 576.

There was *no* evidence introduced showing that appellant's nationality was changed. Indeed, no such evidence could be offered because appellant was ineligible of becoming a citizen of the United States.

> 8 *USCA,* §359;
>
> *Morris v. California,* 291 U. S. 82, 85.

POINT 2.

It Is Undisputed That the Collector of Customs Entered the Vessel's Nationality as Japanese.

The trial court made *no* finding of the nationality of the vessel upon which the decree appealed from was entered. The trial court, on the trial, ruled that the evidence was persuasive, that the Government treated the vessel as a *foreign* vessel by subjecting her to pay light money and numbering her as a *foreign* vessel [R. pp. 151-152]. Subsequently, the then U. S. Attorney *admitted* that the Government had no right to number a *foreign* vessel [R. pp. 159-160]. Thereafter, the trial court made an order reciting that the number allotted to the vessel was allotted to her *"as an alien vessel"* [R. p. 161]. Thereafter, he made findings in which he found as a fact that it was not true that she was an American vessel [Find. XV, R. p. 165], which he subsequently set aside [R. pp. 176-177].

The *undisputed* evidence is that appellant is the owner of the vessel and is a subject of Japan [R. pp. 51, 263]. The trial court found that as a fact [Find. XII, R. p. 315]. That finding impliedly or inferentially is equivalent to a finding that the nationality of the owner is the nationality of the vessel.

It is well settled that the nationality of a vessel is that of her owner.

The Alta, 136 Fed. 513, 519;

United States v. Gordon, 25 F. Cas. No. 15, 231;

The Merritt, 84 U. S. (17 Wall.) 582;

The Chiquita, 19 F. (2d) 417, 418;

United States v. Rodgers, 150 U. S. 249, 260;

United States v. Holmes, 18 U. S. (5 Wheat.) 412;

People v. Taylor, 7 Mich. 161, 209;

United States v. The Pirates, 18 U. S. (5 Wheat.) 184, 199;

United States v. Jenkins, 26 Fed. Cas. No. 15,473;

United States v. Jenkins, 26 Fed. Cas. No. 15,473 A;

Jenks v. Hallet, 1 Cai. N. Y. 60;

Chartered Mercantile Bank v. Netherlands India Steam Nav. Co., 10 Q. B. D. 521, 535;

The Tommi (1914), P. 251, 256;

Regina v. Bjornsen, 10 Cox C. C. (Eng.) 74;

International Nav. Co. v. Lindstrom, 123 Fed. 475, 476;

58 *C. J.* 30, Note 4;

16 *C. J.* 170, Note 16;

36 *Cyc.* 12, Note 2;

25 *Am. & Eng. Ency. of Law* (2d), pp. 863, 864;

Point 29, pp. 93-97, *infra.*

POINT 3.

The Seizure of the Vessel Was in Violation of the Convention Between the United States and Japan of January 16, 1930, Because It Was Undisputed That Appellant Is a Subject of Japan and Owner of the Vessel, and the Seizure Was Made More Than One Hour Sailing Distance From the Coast and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that the nationality of the vessel is that of her owner, and therefore she is deemed to be a Japanese vessel [Find. 27, R. pp. 198-199]; that the Convention between the United States and Japan prohibited the seizure of a vessel unless she is capable of traversing in one hour from the place of seizure to the nearest point of land of the United States [Find. 24, R. pp. 197-198]; that she was incapable of traversing that distance within that time [Find. 6, R. p. 192; Find. 13, R. p. 194]; and as a conclusion of law that the seizure was in violation of said Convention [Con. Q, R. p. 205], which he refused with an exception to appellant [R. p. 208]. He instead found that the seizure was "lawful and proper under the laws of the United States" [Con. II, R. p. 319]. Appellant assigned that as error [Errors 25, R. p. 335; 22, R. p. 334; 6, R. p. 329; 12, R. p. 331; 48, R. p. 341; 78, R. p. 347].

The *undisputed* facts bearing on that branch of the case is that appellant is a subject of Japan and the owner of the vessel [R. pp. 51, 263, 264]; that her maximum speed, loaded, is 7.9 nautical miles per hour [R. pp. 98, 99]; that she was incapable of traversing within one hour from the place of seizure to the coast [R. pp. 269, ...], and the U. S. Attorney *admitted* that she was

"seized more than one hour's sailing distance from shore" [R. p. 150].

The trial court found as a fact that appellant is a subject of Japan and the owner of the vessel [Find. XII, R. p. 315). He made *no* finding as to her nationality, except the order dismissing the libel recites that she was an alien vessel [R. p. 161] and in the findings, found as a fact that she was not an American vessel [Find. XV, R. p. 165], which he subsequently vacated [R. pp. 176-177]. These undisputed facts show that the seizure was in *violation* of the Convention between the United States and Japan.

The Convention between the United States and Japan proclaimed January 16, 1930, [46 U. S. Stat., 2446-2449], insofar as it is material to the point under discussion reads as follows, to wit:

"ARTICLE I.

The High Contracting Parties declare that it is their firm intention to uphold the principle that *three* marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.

ARTICLE II.

(1) The Japanese Government agree that they will raise no objection to the boarding of *private* vessels under the Japanese flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions, in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those

on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions, in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be initiated.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, the vessel may be seized and *taken into a port* of the United States, its territories or possessions, for *adjudication in accordance with such laws.*

(3) The rights conferred by this article *shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.* In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel, and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

* * * * * * * * *

"That the term 'private vessels' as used in the Convention signifies *all* classes of vessels other than those owned or controlled by the Japanese Government and used for Governmental purposes, for the *Conduct of which the Japanese Government assumes full responsibility.* * * *" (Italics ours).

A treaty between the United States and a foreign country is the "supreme law of the land".

U. S. Const. Art. VI, Subd. 2.

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 273.

It is in the nature of, or equivalent to, a legislative enactment.

Whitney v. Robertson, 124 U. S. 190, 194.

"It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States".

Asakura v. Seattle, 265 U. S. 332, 341.

These rules apply to treaties which are self-executing.

Chew Heong v. United States, 112 U. S. 536, 540.

The language of said Convention is the same as between the United States and Great Britain, which was held to be self-executing.

Cook v. United States, 288 U. S. 102, 119.

Treaties must be fairly and faithfully observed.

The Taign Maru, 73 F. (2d) 922, 924.

"Its application to any case and its construction, if construction is needed, are, as with any other law, questions for the court."

Hamilton v. Erie R. R. Co., 219 N. Y. 343, 352.

"Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible,

one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred".

Asakura v. Seattle, 265 U. S. 332, 342.

"The courts can no more go behind it for the purpose of annulling its effect and operation than they can go behind an act of Congress."

United States v. Minnesota, 270 U. S. 181, 202.

"Courts when called upon to act should be careful to see that international engagements are faithfully kept and observed."

Sullivan v. Kidd, 254 U. S. 433, 442.

"The courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms."

Doe v. Braden, 57 U. S. (16 How.) 635, 657.

"To condemn a vessel the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper."

United States v. Schooner Peggy, 5 U. S. (1 Cranch) 103, 110.

It will be noted that said Convention imposed a territorial *limitation* upon the authority of the Government of the United States to make a seizure. It fixed the condition under which a vessel may be seized and taken into a port for adjudication. That condition is that the vessel can traverse under her own power within one hour

sailing from the place of seizure to the coast of the United States.

The said Convention is in language the same as the Convention between the United States and Great Britain. The latter was recently considered by the Supreme Court, and it was held that the Government lacked *power* to seize a vessel beyond one hour sailing distance from the coast, and that the court lacked *power to adjudicate such vessel.*

In the case of *Cook v. United States,* 288 U. S. 102, the court, per Brandeis, J., said at page 120:

> "As the Mazel Tov was seized without warrant of law, the libels were properly dismissed * * *".

and at page 121:

> "* * * The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject

the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

* * * * * * * * *

"Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not met by distinguishing between the custody of the Coast Guard and the subsequent custody of the Marshal. Nor is it lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement. * * *"

The finding that appellant was a subject of Japan and the owner of the vessel entitled him to the benefits of said Convention. If the trial court was in doubt about it, he should have applied the well known rule of construction of treaties, namely, that a treaty must be *liberally* construed in favor of the alien.

Nielson v. Johnson, 279 U. S. 47, 51;
Asakura v. Seattle, 265 U. S. 332, 342;
State v. Tagami, 195 Cal. 522, 527.

It was the duty of the trial court to *scrupulously* enforce said Convention, because good faith between nations requires that a Convention *"shall not be reduced to mere scraps of paper".*

The case of *United States v. Ferris,* 19 F. (2d) 925, is worthy of note. In that case the defendants were mem-

bers of the crew of the steamer "Federalship" of English ownership and Panama registry. She was seized by the Government about 270 miles off the west coast territory of the United States. They were indicted for conspiracy to violate the Prohibition and Tariff acts. The defendants interposed pleas to the jurisdiction of the court over their persons. The court in sustaining their pleas, in an opinion per Bourquin, J., said at page 926:

> "Their contention is that the seizure is illegal, in that it is contrary to and prohibited by the Treaty * * * and that because thereof there can be no jurisdiction of their persons against their wills. * * * The prosecution contends, however, that courts will try those before it, regardless of the methods employed to bring them there. There are many cases generally so holding, but none of authority wherein a treaty or other Federal law was violated, as in the case at bar. That presents a very different aspect and case. 'A decent respect for the opinions of mankind', national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that treaties shall not be reduced to mere 'scraps of paper' ".

The trial court, in the findings of fact upon which the decree appealed from is based, made three additional findings of fact than in the findings of fact which he set

aside. He probably opined that these additional findings of fact would distinguish the instant case from the case of *Cook v. United States,* 288 U. S. 102. The additional findings do *not* distinguish the case at bar from the *Cook* case as a matter of law. The first finding is that appellant maintained a home and is domiciled in the United States [Find. XIII, R. p. 315]. That finding is without any evidence to support it, and is contrary to law (See Point 31, pp. 100-101, *infra*). The second finding is that at the time of the seizure, the vessel did not fly the Japanese flag [Find. XVI, R. p. 316]. That finding does not affect her nationality (See Point 29, pp. 93-97, *infra*). The third finding is that she was not entitled to fly the Japanese flag because she did not have a national certificate [Find. XVI, R. p. 316]. That finding does not affect her nationality because if she did not have a certificate, she is still regarded as an alien vessel (See Point 30, pp. 98-99, *infra*). Moreover, the libelant did not plead the laws of Japan nor were they introduced in evidence. The trial court had no legal right to take judicial notice of the laws of Japan (See Point 27, pp. 89-90, *infra;* Point 28, pp. 91-92, *infra*).

POINT 4.

The Seizure of the Vessel Was in Violation of the Treaty Between the United States and Japan of February 21, 1911, Because Appellant Was Entitled to the Same Treatment as a Subject of Great Britain Under the Most Favored Nation Clause and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that under the Treaty between the United States and Japan of February 21, 1911, (37 U. S. Stat., Part 2, pp. 1504-1509), he was entitled to the same treatment as is accorded by the United States to a subject of the most favored nation [Find. 23, R. p. 197), and as a conclusion of law that neither he nor his vessel violated any statutes or laws of the United States which subjected him to payment of a penalty or condemnation or forfeiture of his vessel and cargo [Cons. Y, Z, AA, BB, R. pp. 206-207] and he refused with an exception to appellant [R. p. 208], and instead found as a conclusion of law that the seizure was "lawful and proper under the laws of the United States" [Con. II, R. p. 319]. Appellant assigned that as error [Errors 56-59, R. pp. 342-343; Error 78, R. p. 347].

The said treaty between the United States and the Empire of Japan of February 21, 1911, proclaimed April 5, 1911, (37 U. S. Stat., Part 2, pp. 1504-1509), insofar as it is material to the point under discussion, reads as follows, to wit:

"ARTICLE IV.

There shall be between the territories of the two High Contracting Parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the Contracting Parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come."

"ARTICLE XIII.

The coasting trade of the High Contracting Parties is excepted from the provisions of the present Treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either Contracting Party shall enjoy in this respect most-favored-nation treatment in the territories of the other."

"ARTICLE XIV.

Except as otherwise expressly provided in this Treaty, the High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."

This treaty "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts".

Asakura v. Seattle, 265 U. S. 332, 341.

The appellant, under the "most favored nation" clause of said Treaty, was entitled to the same treatment as is accorded by the United States to a subject of the most favored nation.

Santovincenzo v. Egan, 284 U. S. 30, 38.

The trial court held that said Convention between the United States and Japan is in language the *same* as the Convention between the United States and Great Britain [R. p. 182]. It was held that under that Convention the Government of the United States *lacked* power to seize a British vessel on the high seas more than one hour sailing distance from the place of seizure nearest to the coast, and that the court *lacked* power to adjudicate such vessel.

Cook v. United States, 288 U. S. 102, 121.

The appellant, under said Treaty between the United States and Japan of February 21, 1911, was entitled to the benefits of the decision in the *Cook* case and to the *same* treatment as is accorded by the United States to a subject of Great Britain.

Santovincenzo v. Egan, 284 U. S. 30, 38.

POINT 5.

The Test Whether Appellant Was Entitled to the Benefits of the Convention and Treaty Is His Nationality and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he claimed the benefits of said Convention and Treaty [Find. 27, R. pp. 198-199]. The trial court refused to make said finding with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335].

What is the *test* of the application of a treaty? There is but one answer to that question, namely, the *nationality* of the person whose property is sought to be condemned

> "Nationality is the link between individuals and the benefits of the law of nations."
>
> *1 Oppenheim Int. L.,* (3d. Ed. 1920), p. 465.

Says Mr. Chief Justice Hughes, the *"test of the application"* of a treaty *"appears to be that of nationality, irrespective of the acquisition of a domicile as distinguished from residence".*

Santovincenzo v. Egan, 284 U. S. 30, 39.

POINT 6.

The Finding That Appellant Was a Subject of Japan Entitled Him to the Benefits of the Convention and Treaty and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he was entitled to the benefits of said Convention and Treaty [Find. 27, R. pp. 198-199]. The trial court refused to make that finding with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335].

The trial court, having found that appellant was a *subject* of Japan, should have found that he was entitled to the benefits of said Convention and Treaty, because appellant's status as a subject of Japan remained unchanged.

The case of *Santovincenzo v. Egan,* 284 U. S. 30, is squarely in point. In that case, the trial court refused to give the benefits of a treaty to an estate of an alien subject. The court in reversing the judgment appealed from, in an opinion per Hughes, Ch. J., said at page 38:

> " * * * The clear import of the provision is that, so long as they retained their status as citizens of the United States, they would be entitled to the guarantee of Article III. The same would be true of Persians permitted to reside here under the Treaty. * * * "

A formal claim of rights under a treaty need not be made in an answer.

Ehrlich v. Weber, 114 Tenn. 711, 726;

Butschkowski v. Brecks, 94 Neb. 532, 535.

The reason for the rule stated is that the Constitution, laws of the United States and treaties are the "Supreme Law of the Land".

U. S. Const. Art. VI, Subd. 2;

Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 273.

POINT 7.

The Information Did Not Allege That the Seizure Was Made Within One Hour Sailing Distance From the Coast and Therefore Did Not State a Cause of Action and for That Reason the Trial Court Was Without Jurisdiction and That Objection May Be Raised Even for the First Time on Appeal.

Appellant requested the trial court to find as a fact [R. p. 190] that he had no jurisdiction in the premises [Find. 27, R. p. 198], and as a conclusion of law that all proceedings based on the seizure are void [Con. U, R. p. 205], and he refused with an exception to appellant [R. p. 208]. The trial court instead found that he had jurisdiction of these proceedings [Con. II, R. p. 319]. Appellant assigned that as error [Errors 25, R. p. 335; 52, R. p. 342; 78, R. p. 347].

The question whether or not the libel of information stated a cause of action depends upon the question whether

or not the seizure was made more than one hour sailing distance from the coast.

Cook v. United States, 288 U. S. 102;

Point 3, pp. 38-46, *supra.*

The original libel of information did not allege the *place* where the vessel was seized [R. pp. 5-9]. The amended libel of information alleged that she was seized 10½ miles from shore [R. p. 25]. Neither informations alleged that she was seized *within* one hour sailing distance from the coast [R. pp. 5-9, 25-29]. Therefore they did not state a cause of action.

The libel of information must state the *place* of seizure and show that it was *within* the jurisdiction of the United States, and *within* the jurisdiction of the court.

U. S. Sup. Ct. Admiralty Rule 21.

"A libel in a cause of forfeiture must state the facts which give the court jurisdiction."

The Hoppet v. United States, 11 U. S. (7 Cranch.) 389, 394;

The Ada M., 67 F. (2d) 333, 334.

"Jurisdiction must be affirmatively shown on the face of a libel"; it cannot be inferred.

El Oriente, 5 F. (2d) 251, 253.

A libel of information which fails to allege "the vessel was seized at a place from which it could reach the shore in one hour and is therefore demurrable".

The Ada M., 67 F. (2d) 333, 335.

If the libel of information fails to allege that the seizure was made within one hour sailing distance from the coast, it does not allege a cause of action.

Cook v. United States, 288 U. S. 102;

The Ada M., 67 F. (2d) 333, 335;

Henning v. United States, 13 F. (2d) 75, 76;

The Sagatind, 11 F. (2d) 673, 675;

The Over the Top, 5 F. (2d) 838, 844;

The Pictonia, 3 F. (2d) 145, 148;

United States v. Schooner Frances Louis, 1 F. (2d) 1004, 1005.

"It was the duty of the trial court to note such lack of jurisdiction, irrespective of the action of the parties."

28 *USCA* §80;

Woodhouse v. Budwesky, 70 F. (2d) 61, 62;

Williams v. Nottawa Twp., 104 U. S. 209, 212.

There is no presumption in favor of jurisdiction.

Calif.-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, 10.

"There is no presumption in favor of the jurisdiction of the courts of the United States."

Ex parte Smith, 94 U. S. 455, 456.

The presumption "is, that a cause is without its jurisdiction unless the contrary affirmatively appears".

Robertson v. Cease, 97 U. S. 646, 649.

"If the jurisdictional facts are not alleged in the pleadings, the judgment or decree while not an absolute nullity, is erroneous, and may upon writ of error or appeal be reversed for that cause".

Calif.-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, 11.

Moreover, the libel of information does not allege the *nationality* of the vessel proceeded against. It alleges that the libel is against "American Oil Screw 'Patricia'" [R. p. 25] but the words before the name of the vessel are merely a part thereof and not an allegation of her nationality.

"A libel in rem ought to state the nationality of the vessel proceeded against."

The Falls of Keltie, 114 Fed. 357, 359.

The objection can be taken at any stage of the proceedings.

The Ann, 13 U. S. (9 Cranch.) 289;

The Fideliter, 1 Abb. U. S. Rep. 577;

United States v. One Raft of Timber, 13 Fed. 796, 799;

The Sagatind, 4 F. (2d) 928, 930.

That objection may be raised for the *first* time on appeal.

United States v. One Raft of Timber, 13 Fed. 796, 799.

POINT 8.

The Collector of Customs Had No Power to Enter and Number the Vessel and Her Nationality Was Not Changed by Numbering Her and the Refusal to Find That Was Error.

The trial court in his order dismissing the libel against the vessel found that the Collector of Customs numbered her *"as an alien vessel"* [R. p. 161]. Appellant requested the trial court to find as a fact [R. p. 190] that the Collector of Customs had no authority to number her and that the number did not attach any dignity to her [Find. 26, R. p. 198] and as a conclusion of law that the statute authorizing the numbering of a vessel did not apply to an *alien* owned vessel [Con. G, R. p. 203]; that the Collector had no right to number her [Con. H. R. p. 203]; that the number did not convert her into an American vessel [Con. I, R. p. 203] and that the number appearing on her stern did not attach any dignity [Con. J, R. p. 203]. The trial court refused to make said findings with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 24, R. pp. 334-335; Error 38-41, R. pp. 339-340].

The Collector of Customs, upon the application of an owner or master, may number an undocumented vessel of sixteen feet in length *"owned in the United States"*.

Act June 17, 1918, 40 Stat. 602, 46 USCA §288.

The phrase "owned in the United States" must be construed to mean belonging to a *citizen* of the United States

for the reason that an American built, *alien* owned vessel is required to pay *"light money"* and not a vessel owned by a citizen of the United States.

R. S. §4225, 38 U. S. Stat. 1193, 46 USCA §128.

Also because a vessel over 20 tons enrolled and a vessel less than 20 tons licensed, *"and no others,* shall be deemed vessels of the United States."

R. S. §4311, 1 U. S. Stat. 305, 46 USCA §251.

A vessel belonging *"wholly to citizens"* of the United States *"and no others* may be registered".

R. S. §4132, 46 USCA §11.

A vessel possessing the same qualifications may be licensed.

R. S. §4312, 46 USCA §253.

Moreover, a vessel is regarded as a floating island (*Cunard S. S. Co. v. Mellon*), 262 U. S. 100). A vessel is a part of the territory to which she belongs (*Wilson v. McNamee,* 102 U. S. 572, 574). "Constructively they constitute a part of the territory of the nation to which the owners belong". (*United States v. Rodgers,* 150 U. S. 249, 260). It is very obvious that the Collector of Customs had no power to number the vessel in question.

Furthermore, the U. S. Attorney, at the trial, *admitted* that there is no authority to number an *alien* owned vessel and that the Collector of Customs, in numbering an alien owned vessel *exceeds* his authority [R. p. 159-160].

POINT 9.

The Seizure Should Have Been Quashed Because the Government Had No Power to Make It and the Court to Adjudicate It and the Refusal Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that he made a motion to quash the seizure and that motion was denied [Find. 27, R. p. 198] and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 25, R. p. 335]. He found that appellant filed the papers on said motion [Find. IX, R. p. 314].

The *undisputed* facts are that appellant appeared *specially,* objected to the jurisdiction of the court and moved to quash the seizure of the vessel and all proceedings based thereon [R. pp. 31-39], upon the ground that she was a Japanese vessel, and the Government had no power to seize her at the place where she was seized [R. pp. 32-33]. These issues were tried in open court [R. pp. 40-41].

The *undisputed* evidence bearing on that branch of the case, is that appellant was born in Japan; that he is not a citizen of the United States; that he is the sole owner of the vessel [R. p. 51]; that she was entered and numbered by the Collector of Customs, Marine Department [R. pp. 134-135], as an *alien* Japanese vessel [R. pp. 141, 143]; that she paid *"light money"* from the time she was built to the date of seizure [R. p. 143]; that her speed, loaded,

is 7.9 nautical miles per hour [R. pp. 98, 99]. The U. S. Attorney *admitted* that she was *"seized more than one hour's sailing distance from shore"* [R. p. 150].

The trial court denied appellant's motion to quash the seizure with an exception to appellant [R. p. 99].

The trial court, upon these undisputed facts, should have quashed the seizure of the vessel and all proceedings based thereon, as a matter of strict legal right, and not of discretion, because:

(1) The Government lacked power to make the seizure and the trial court lacked power to adjudicate the vessel;

Cook v. United States, 288 U. S. 102;

Point 3, pp. 38-46, *supra.*

(2) The appellant was entitled to the same treatment as a subject of Great Britain under the most favored nation cause of said Treaty.

Point 4, pp. 47-49, *supra.*

POINT 10.

The Filing of the Answer Was Not a Waiver of the Objection That the Government Lacked Power to Make the Seizure and the Trial Court to Adjudicate It.

Appellant requested the trial court to find as a conclusion of law [R. p. 190] that the search and seizure of the vessel was in violation of said Convention [Con. Q, R. p. 205] and he refused, with an exception to appellant [R. p. 208] and instead made a conclusion of law that he had "jurisdiction over these proceedings" [Con. II, R. p. 319]. Appellant assigned that as error [Error 48, R. p. 341; Error 78, R. p. 347].

The objection that the seizure was unlawful is based upon the fact that the Government of the United States lacked power to seize the vessel and the trial court lacked power to adjudicate the vessel. That objection, says the court, is not *"lost by the entry of an answer to the merits"*.

Cook v. United States, 288 U. S. 102, 122.

That rule was applied in the Federal Courts to other classes of cases.

So. Pac. R. Co. v. Denton, 146 U. S. 202, 206;
Harkness v. Hyde, 98 U. S. 476, 479;
Foster, Milburn Co. v. Chinn, 202 Fed. 175, 177.

POINT 11.

Appellant's Motion for Judgment Should Have Been Granted Because the Libelant Did Not Prove a Cause of Action and the Refusal Was Error.

Appellant, at the close of the case, moved for judgment in his favor upon the ground, among others, that the undisputed facts showed that he is a subject of Japan and the sole owner of the vessel; that her nationality is deemed that of her owner; that she was incapable of traversing within one hour sailing distance from the place of seizure to the coast; that under said Convention and Treaty, she was immune from seizure [R. pp. 108-113], and that motion is deemed denied because of the entry of the decree of forfeiture. Appellant assigned that as error [Error 90, R. pp. 350-352].

The *test* of the applicability of a Convention and Treaty to a vessel is the nationality of her owner.

Point 5, p. 50, *supra.*

The Government lacked power to seize the vessel at the place where she was seized, and the trial court lacked power to adjudicate her.

Point 3, pp. 38-46, *supra.*

POINT 12.

The Trial Court Had No Power to Vacate the Decree Dismissing the Libel Because That Power Resides in This Court and the Refusal to Vacate That Order Was Error.

The trial court made findings of fact [R. pp. 162-166], conclusions of law [R. pp. 167-169], a final decree *dismissing* the libel, and directed the return of the vessel and cargo [R. pp. 170-172], and it was *recorded* on June 29, 1933 [R. p. 172]. Thereafter he made an order vacating said decree and findings [R. p. 176]. Subsequently, he made an order modifying said order [R. p. 177]. Thereafter, he granted appellant exceptions to the making of said orders [R. pp. 181-183]. Appellant requested the trial court to find [R. p. 190] that he made said orders [Finds. 31, 32, R. pp. 200-201], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 91, R. p. 352].

The application to vacate said final decree was in effect for a *new* trial, and the trial court had no *power* to grant such application.

The jurisdiction of admiralty courts depends upon the laws of Congress and decisions of the United States Supreme Court.

Ex parte Eston, 95 U. S. 68, 70;

Cope v. Vallette Dry-Dock Co., 10 Fed. 142, Aff'd in 119 U. S. 625.

The granting of a new trial in admiralty is unknown.

Greigg v. Reade, 10 Fed. Cas. No. 5, 804;
1 *C. J.* 1339. Note 65.

The reason for the rule stated is that an appeal to this court is a trial *de novo.*

Brooklyn Eastern Terminal v. United States, 287 U. S. 170, 176;

The San Rafael, 141 Fed. 270, 275;

Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 570;

The Mabel, 61 F. (2d) 537, 540;

The Cleary Bros. No. 61, 61 F. (2d) 393, 395.

"An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken".

The Lucille, 86 U. S. (19 Wall.) 73, 74.

A new trial will not be granted in admiralty on the ground that a prior decision is inconsistent with that given.

Thomasser v. Whitwell, 23 Fed. Cas. No. 13,930;

The Frederick Der Grosse, 37 F. (2d) 355.

"State statutes relating to the granting of new trials are not applicable."

United States v. Mayers, 235 U. S. 55, 69;

Bronson v. Schulten, 104 U. S. 410, 417.

The statute *limits* the granting of a new trial in admiralty to cases *"where there has been a trial by jury."*

28 USCA §391.

"It applies to the Great Lakes and waters connected therewith, and then not to all issues of fact, but only to those arising in cases of contract or tort. *It cannot be availed of in cases of foreign vessels or of vessels trading between ports of the same state,* and introduces a system of trial wholly foreign to the practice, forms, and procedure of courts of admiralty."

The Western States, 159 Fed. 354, 356, cer. denied 210 U. S. 433;

28 USCA §770;

The Sarah, 21 U. S. (8 Wheat.) 391;

Whealen v. United States, 11 U. S. (7 Cranch.) 112;

The Betsy, 8 U. S. (4 Cranch.) 443;

United States v. La Vengeance, 3 U. S. (3 Dal.) 297, 301;

The Empire, 19 Fed. 558;

The Meteor, 17 Fed. Cas. No. 9,498;

Clark v. United States, 5 Fed. Cas. No. 2,837.

"Although the two jurisdictions are vested in the same tribunals, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law."

The Sarah, 21 U. S. (8 Wheat.) 391, 394.

POINT 13.

The Denial of the Motion to Set Aside the Orders Vacating the Decree Was Error.

Appellant moved to vacate the orders vacating the decree upon the ground, among others, that the trial court had no power to make said orders [R. pp. 183-184] and he reserved decision on that motion [R. pp. 187-189]. That motion is deemed denied because of the entry of the decree of forfeiture. Appellant assigned that as error [Error 91, R. p. 352].

The trial court had no power to vacate the decree dismissing the libel.

Point 12, pp. 62-64, *supra*.

POINT 14.

The Ex Parte Order of August 2, 1934, Should Have Been Vacated Because the Matters Set Forth for Hearing Were Not Issues in This Case and the Refusal Was Error.

The trial court on the settlement of the findings and decree, made an *ex parte* order setting the case down for hearing on the following matters: (1) that the Collector of Customs did not request the United States Attorney to institute this libel against the *cargo* but only the vessel; (2) that the Collector of Customs *destroyed* the cargo except 5 cases for use of evidence; (3) that the United States Marshal did not *attach* the cargo, but only the vessel, and (4) that appellant did not file a *claim* for the cargo with the Collector of Customs [R. pp. 209-210]. At the opening of that hearing, the trial court granted appellant an exception to that order [R. p. 211]. Thereupon, appellant moved to vacate that order upon the ground that the matters to take proof under that order were not *issues* raised in the pleadings [R. pp. 211-212]. The trial court denied that motion with an exception to appellant [R. p. 211]. Appellant assigned that as error [Error 93, R. p. 353].

A cursory perusal of the pleadings will show that the matters recited in the order to take proof are not issues raised by the pleadings [R. pp. 5-9, 15-21, 25-29].

The evidence that the Collector of Customs did not request the U. S. Attorney to institute this libel against the

cargo is in contradiction of the allegations of the original libel of information [R. pp. 5-9], and the amended libel of information [R. pp. 25-29], and was inadmissible.

Point 15, pp. 68-70, *infra.*

It was immaterial as to what request the Collector of Customs made. It was the duty of the U. S. Attorney to include the cargo in this proceeding.

Point 17, p. 72, *infra.*

The Collector of Customs had no *power* to destroy the cargo, but was in duty bound to retain it until it was adjudicated in this proceeding.

Point 40, pp. 115-117, *infra.*

If the Collector of Customs destroyed the cargo before adjudication, he did so at his peril, and the trial court had no power to take testimony for the purpose of prejudging that question, because that was not in issue in this proceeding.

The question whether or not appellant filed a claim was not an issue raised by the pleadings.

It was not necessary to file a claim with the special appearance on the motion to quash. That objection was not made before trial, and is deemed as waived. The trial court, and the libelant, treated appellant's answer as a claim and it was immaterial whether a formal claim was filed.

Point 23, pp. 80-82, *infra.*

POINT 15.

The Ex Parte Order Was a Travesty Upon Justice Because It Permitted Libelant to Contradict Its Libel of Information and Orders of the Court Which It Procured and the Refusal to Set It Aside Was Error.

Appellant moved to set aside the *ex parte* order permitting libelant to contradict its information upon the ground that the matters stated therein were not *issues* raised by the pleadings [R. p. 211], and that motion was denied with an exception to appellant [R. p. 212]. Appellant assigned that as error [Error 93, R. p. 353].

The *cargo* was included in the original libel of information [R. pp. 5-9], order for process to issue [R. pp. 10-11], monition [R. pp. 12-13], and amended libel of information [R. pp. 25-29]. The trial court by said *ex parte* order permitted the libelant to *contradict* them. This was a novel procedure in the history of jurisprudence of law, but the innovation is contrary to the well established principles of law.

> "In the first place parties are entitled to rely upon the pleadings."
>
> *The Russell*, U. S. 3, 7 Fed. Supp. 812-813.

The case of *The William Harris*, 29 Fed. Cas. No. 17,-695, is directly in point. The libel was for wages earned on a voyage. The libel alleged that the vessel was about to proceed to sea before the expiration of ten days from the discharge of the cargo and the answer did not deny that allegation. The court, per Ware, J., said:

> "* * * No evidence can properly be received to contradict it, because the proof must be confined to

the matters in issue. The court cannot travel out of the record to decide questions which the parties have not submitted to it, and nothing is submitted to its determination but what is distinctly alleged on one side and contradicted on the other. It is true that courts of admiralty are not restrained by strict technical rules of pleading which prevail at common law, but it is not less true in all courts, that the matter in controversy must be distinctly propounded, and each party must set forth by plain and precise allegations the grounds on which he asks for the judgment of the court in his favor, as well as to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them. * * *"

The case of *The Mary C.,* 16 F. Cas. No. 9,201, is directly in point. In that case the court, per Fox, J., said:

" * * * After the case had been fully heard and the arguments closed, a motion was made by his proctor for leave to amend this averment in his answer by changing northwest to northwest by west. The amendment was not allowed; and on further reflection I am satisfied that the ruling was correct. The cause had been fully heard and argued to the court, with this in the answer as to the course of the wind; it was a deliberate, sworn statement by the master, of the fact as he understood it to have been when called upon to respond to the charges against him in the libel, and it is not the practice of any court, at such a stage of the cause, to permit a material amendment which will destroy the effect of an admission of so much importance, relative to a matter which had been a principal subject of controversy before the court for more than ten days * * *."

If the practice here inaugurated be indulged in with impunity, what will become of the doctrine of *secundum allegata et probata,* which was in existence before our Government? The judicial ermine did not clothe the trial court to do as he pleased. He can act only judicially, which means within the rules of law. He cannot travel outside of the record to decide questions not in issue, because he was asked *ex parte* by one of the parties to this litigation.

The maxim applies to prosecutions in courts of admiralty and is "essential to the due administration of justice in all courts".

The Hoppet, 11 U. S. (7 Cranch.) 389, 394.

A departure from the doctrine of *secundum allegata et probata* will create "inextricable confusion and uncertainty and mischief in the administration of justice".

Wright v. Delafield, 25 N. Y. 266, 270.

It is elementary that in an admiralty case, "the proof must conform to the allegations. Certain it is that the decree must be *secundum allegata et probata*".

The Reichert Line, 64 F. (2d) 13, 14.

That is the rule in the State Court.

Barrere v. Somps, 113 Cal. 97, 102.

"The very object and design of all pleadings" is that the party "may thus have an opportunity of meeting and defeating it". If the doctrine may be disregarded, "the parties might better be permitted to state their demands orally before the court at the time of trial, as is done in courts of justice of the peace".

Soden v. Murphy, 42 Colo. 352, 356.

POINT 16.

The Evidence Contradicting the Libel of Information Should Be Disregarded, Because It Was Received Over Appellant's Objection and Exception.

The appellant moved to set aside the *ex parte* order setting this proceeding down for further hearing with respect to matters stated therein, upon the ground that they are not issues tendered by the pleadings and that motion was denied with exception to appellant [R. pp. 211, 212]. Appellant assigned that as error [Error 95, R. p. 353].

The additional testimony taken under appellant's objection and exception should be disregarded.

> "A cardinal principle in admiralty proceedings is, that proofs cannot avail a party further than that they are in correspondence with the allegations of the pleadings."
>
> *The Rhode Island,* 20 Fed. Cas. No. 11,745, quoted with approval in *Second Pool Coal Co. v. People's Coat Co.,* 188 Fed. 892, 895;
>
> *The Hoppet v. United States,* 11 U. S. (7 Cranch.) 389;
>
> *Treadwell v. Joseph,* 24 Fed. Cas. No. 14,157;
>
> *Jenks v. Lewis,* 13 Fed. Cas. No. 7,280;
>
> *The Wm. Harris,* 29 Fed. Cas. No. 17,695;
>
> *Ward v. The Fashion,* 29 Fed. Cas. No. 17,155.

In the case of *Kenah v. The Tug John Markee, Jr.,* 3 Fed. 45, the answer to the libel admitted the contract and notwithstanding that, testimony was introduced to show different facts and impeaching that admission. The court per Butler, D. J., said at page 46:

> " * * * This will not, however, relieve the respondent from the effect of his admission and statement, *as evidence,* in passing upon the new issue raised * * * " (Italics ours).

POINT 17.

The Statute Required the U. S. Attorney to Being One Libel for the Cargo and Vessel and if He Brought Separate Libels the Court Was Directed to Consolidate Them. Therefore It Was Immaterial That Collector's Instructions Did Not Include the Cargo.

The trial court found as a fact that the Collector of Customs requested the U. S. Attorney to libel the vessel [Find. V, R. p. 313], and as a conclusion of law that the cargo did not come within "the jurisdiction of this court" [Con. I, R. p. 319]. Appellant assigned that as error [Errors 93, R. p. 353; 65, R. p. 344].

The officer is required to immediately report the seizure to the Collector of Customs.

> §602 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA §1602.

The latter is required to report the seizure to the Solicitor of the Treasury and U. S. Attorney.

> §603 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA, §1603.

The latter is required to determine whether the facts warrant to institute a libel.

> §604 *Tariff Act* 1930, 46 U. S. Stat., Part 1, p. 754, 19 USCA, §1604.

If he concludes to bring suit, he must bring *one* libel for the cargo and vessel and if he brings separate suits, the court is *directed* to consolidate them.

> *R. S.* §920, 28 USCA §733.

POINT 18.

The Libel Included the Cargo and Appellant Relying Thereon Gave Up Important Legal Rights and Over Two Years After That Libelant Denied the Propriety of Its Inclusion. That Was a Fraud Upon Appellant.

The original libel of information, order for process to issue, monition and amended libel of information was against the *cargo* and vessel [R. pp. 5-13, 25-29]. The proceeding was tried upon that theory, and the trial court treated the cargo as involved in this proceeding in the order dismissing the libel, the findings and decree entered thereon [R. pp. 161-172] which he later vacated [R. pp. 176-177]. The libelant, over *two* years after the filing of the original libel, then, for the *first* time, denied the propriety of the inclusion of the cargo and this upon false premises. The libelant claimed that the Collector requested the former U. S. Attorney to libel the vessel and made no mention of the cargo [R. pp. 225-226]. The present U. S. Attorney by innuendo contended that the former U. S. Attorney surreptitiously included the cargo [R. pp. 230-234]. It was the *duty* of the former U. S. Attorney to include the cargo in this libel, irregardless the Collector made no request (Point 17, p. 73, *supra.*)

The libelant lulled appellant into security that this proceeding involved the condemnation of the *cargo* and vessel. He subsequent changed scene, by claiming that this proceeding did not include the condemnation of the *cargo,* that amounted in legal effect to the absorption of legal rights by legal fraud.

The case of *People v. Schwartz,* 201 Cal. 309, is akin to the instant case. In that case, the defendant, upon the promise of immunity, made a clean breast of the offense committed, and subsequently, she was sentenced to imprisonment. She sought to withdraw the plea of guilty, which was refused, and the order upon appeal was reversed. The court, in an opinion per Preston, J., said at pages 313-314:

> " * * * The facts as alleged fully warrant the conclusion that substantial rights of defendant have been taken away from her without an opportunity for a hearing on the merits, and this by those persons charged with the enforcement of the law. While no personal blame may attach to anyone connected with the matter, yet, if said allegations be true, the failure of the court to adopt the covenants made by the district attorney and the grand jury with defendant amounted in legal effect to the absorption of her legal rights by at least legal fraud. * * * "

The case of *Boles v. City of Richmond,* 133 S. E. 593, is in point. The plaintiff served a notice of the accident and was informed that the City disclaimed liability, because of plaintiff's contributory negligence. The City, on the trial, claimed that the notice was insufficient. It was held that the City could not raise that objection. The court, per Holt, J., said at page 595:

> "* * * It would violate every principle of fair dealing for the City to say you may have had a case, but with a *red herring* we have distracted your attention from a fatal technical omission in your notice. We have lulled you to sleep, and now your day of grace has passed. * * *." (Italics ours.)

POINT 19.

The Trial Court Should Have Taken Judicial Notice of the Judgment in the Criminal Action Because It Impliedly Determined That the Vessel's Nationality Was Japanese and the Seizure Was Unlawful and the Refusal Was Error.

The appellant, in moving to set aside the orders which vacated the final decree dismissing the libel [R. p. 183] requested the trial court to take judicial notice of the judgment in the criminal action arising out of the seizure in this proceeding [R. p. 184], and he reserved decision thereon [R. pp. 188-189]. The appellant requested the trial court to find [R. p. 190] that he made such request [Find. 30, R. p. 200], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 28, R. pp. 336-37].

The settled rule in the Federal Courts is that it will take judicial notice of its own records.

In re Boardman, 169 U. S. 39, 44;

Craemer v. Washington, 168 U. S. 124, 128.

The rule stated applies to records of criminal actions.

United States v. Wright, 224 Fed. 285, 286;

Withaup v. United States, 127 Fed. 530, 536;

In re Bennett, 84 Fed. 324, 327.

That rule applies to a special plea sustained in a criminal action.

Robinson v. State, 21 Tex. A. 160, 162.

POINT 20.

The Judgment-roll in the Criminal Action Should Have Been Received in Evidence Because It Impliedly Adjudged That the Nationality of the Vessel Was Japanese and That Her Seizure Was in Violation of the Convention and Treaty and Its Exclusion Was Error.

The appellant, upon the hearing pursuant to the order of August 2, 1934 [R. pp. 209-210], offered in evidence the judgment-roll in said criminal action [R. p. 258]. The libelant objected upon the ground it "not having a proper foundation laid and immaterial to prove any of the issues in this action", and the trial court sustained that objection with an exception to appellant [R. p. 258]. The judgment-roll was marked for identification [R. p. 258], and a brief statement thereof is in the Apostles on Appeal [R. p. 259]. Appellant requested the trial court to find as a fact [R. p. 190] that said judgment was conclusive [Finds. 29, 30, R. pp. 199-200], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 27, 28, R. pp. 336, 337].

The objection that appellant did not lay "a proper foundation" was frivolous. What foundation was necessary to lay? This court will take judicial notice that the initial next to the number of the case is the same as the trial judge who tried this case. The latter could have looked at the judgment-roll to identify its genuineness, and that it was a record of his court.

The objection that it was "immaterial to prove any of the issues in this case" is likewise frivolous, if not preposterous. A cursory reading of the judgment-roll will reveal that the questions of the nationality of the vessel, and the right to seize her, were necessarily involved therein. It is very obvious that the judgment-roll in said criminal action was material in this action for the reason that the trial court quashed the indictment and in doing so must have found as a fact that the nationality of the vessel was Japanese, and that her seizure on the high seas was in violation of said Convention and Treaty. To say, therefore, that the judgment-roll in the criminal action was immaterial is not talking common sense nor law.

The judgment-roll in the criminal action was not offered in evidence in bar of this proceeding, but merely as evidence of the fact in issue. As evidence of a fact in issue, it was competent although not pleaded like any other evidence, whether documentary or oral. As evidence, it was conclusive as an adjudication of the same fact, the same as any other species of documentary evidence.

Krekeler v. Ritter, 62 N. Y. 372, 374;
Higuera v. Corea, 168 Cal. 788, 789;
Stockton v. Knock, 73 Cal. 425, 426;
15 *Cal. Jur.* 208, §230, Notes 10-13;
34 *C. J.* 1066, §1507, Note 73.

POINT 21.

The Trial Court Should Have Excluded the Precept and Return in the Case No. 4024-C Because It Was Not Pleaded in the Libel of Information and Was Not Recited in the Order to Take Further Proof.

On the hearing, under the order of August 2, 1934 [R. p. 209], libelant offered in evidence the precept and Marshal's return in the case of *Garbutt-Walsh, Marine Hardware Company, et al. v. The Boat "Patricia", etc.,* "to show a break in the title" [R. p. 395]. Appellant objected to its introduction in evidence upon the ground that it was incompetent, irrelevant and immaterial, and not binding upon him [R. p. 290]. It will be recalled that the records produced by the Collector of Customs, Marine Department, did not show a break in the title, but showed that the vessel was owned by subjects of Japan continuously from the time she was built up to the time she was seized on the high seas.

The libelant did not plead said judgment nor said precept and return in the original libel of information [R. pp. 5-9] nor in the amended libel of information [R. pp. 25-29], nor was that recited in the order of August 2, 1934 [R. p. 209].

Minick testified that the vessel was sold to one Homer Pitner [R. p. 296], but, as stated above, the records of the Collector of Customs, Marine Department, did not show such sale, and it is fair to assume that Homer Pitner acted merely as agent for O. Uymato and K. Uyegi or George Kioo Agawa, the former owner of the vessel in question. Moreover, the libel of information does not allege the sale as a violation. Furthermore, the fact remains that appellant was the sole owner of the vessel when she was seized on the high seas, and there is no dispute that he is a subject of Japan.

POINT 22.

It Was Not Necesary to File a Claim for the Cargo With the Collector of Customs and the Finding That He Rightfully and Lawfully Disposed of It Is Against Law and Erroneous.

The trial court found as a fact that no claim for the cargo was filed with the Collector of Customs [Find. VI, R. pp. 313-314], and as a conclusion of law found that he rightfully and lawfully disposed of it [Con. I, R. p. 319]. Appellant assigned that as error [Errors 66, R. p. 345; 77, R. p. 347].

The *cargo* was included in the libel of informations for adjudication [R. pp. 5-9, 25-29]. The order directed that process issue against the *cargo* and vessel [R. pp. 10-11], and the monition included the *cargo* [R. pp. 12-13]. The Collector of Customs was the mere legal *custodian* of the cargo and required by statute to hold it to *"await disposition according to law"*, and he could not dispose of same until a *decree* was entered.

§§602, 605, 611, *Tariff Act* 1930, 46 U. S. Stat., Part I, pp. 754-755;

Point 40, pp. 115-117, *infra*.

It was therefore unnecessary to file a claim for the cargo with the Collector when as a matter of fact the cargo was being adjudicated in this proceeding.

POINT 23.

It Was Not Necessary to File a Claim on the Motion to Quash the Seizure. The Objection Was Not Raised Before Trial and Is Deemed Waived. Appellant Was Excused From Filing a Claim Because He Was Then Under Indictment. The Answer Was Treated as a Claim and Precluded Libelant From Raising the Question After Trial.

The trial court found as a fact that appellant did not file a claim for the cargo [Find. X, R. p. 318]. Appellant assigned that as error [Error 68, R. p. 345].

(1) The Apostles on Appeal show that appellant appeared *specially,* objected to the jurisdiction of the court and moved to quash the seizure [R. pp. 31-39].

It is not necessary to file a claim upon a *special* appearance.

> *E. J. Du Pont de Nemours & Co. v. Bentley,* 19 F. (2d) 354.

(2) The libelant raised the objection for the *first* time *ex parte* on the settlement of the findings and decree [R. p. 210]. The objection was made too late.

An objection that a claim was not filed must be made *before* trial, and if not made then it is deemed waived.

> *United States v. 422 Casks of Wine,* 26 U. S. (1 Peters) 547, 549;
>
> *White v. Cynthia,* 29 F. Cas. No. 17, 546a;
>
> *The Prindiville,* 19 F. Cas. No. 11,435;
>
> *Aumach v. The Queen of the South,* 2 F. Cas. No. 657a;
>
> *The Boston,* 3 F. Cas. No. 1,673;
>
> *Brown on Admiralty,* 485.

(3) The libelant, if he contests the right of claimant, may file exceptions and raise that point.

The John K. Gilkinson, 150 Fed. 454;

The Seminole, 42 Fed. 924, 925;

The Two Marys, 10 Fed. 919.

The libelant did not file exceptions that appellant did not file a claim and could not urge that on the settlement of the findings and decree.

(4) The trial court had no jurisdiction to adjudicate the cargo or vessel.

Point 3, pp. 38-46, *supra;*

Point 4, pp. 47-49, *supra.*

The rule providing for the filing of a claim was intended to apply to a case where the trial court has jurisdiction to make an adjudication and not in a case where he had none.

(5) Appellant was under indictment arising out of the seizure in this proceeding [R. p. 259]. That would have excused him from filing an answer.

U. S. Supr. Ct. Admiralty Rule 30.

That rule is broad enough to excuse the filing of a "claim".

(6) The Apostles on Appeal show that appellant filed a stipulation for costs [R. pp. 23-24], and he thereby acquired the status of a party in this proceeding.

Briggs v. Taylor, 84 Fed. 681, 683.

(7) The libelant recognized appellant as the claimant of the cargo and vessel [R. pp. 41, 172, 208, 321, 324]. The trial court did likewise [R. pp. 161, 178, 208, 210, 310]. The preamble of the findings recites that the trial court heard the cause upon appellant's *"claim and answer"* [R. p. 311]. The body of the findings refers to appellant as the *"claimant"* [Finds. XII, R. p. 315; XIII, R. p. 315; XIV, R. pp. 315-316; XXVII, R. p. 316]. The body of the decree also refers to appellant in several places as the *"claimant herein"* [R. pp. 323-324]. The libelant was thereby estopped from raising the question.

(8) Appellant testified that he was the owner of the vessel seized [R. pp. 51, 283], and the trial court found that as a fact [Find. XII, R. p. 315]. On the hearing *after* the trial, the trial court questioned appellant at great length regarding the cargo [R. pp. 265-273], and elicited from him that it was placed on board of his vessel on the high seas from a vessel in distress [R. pp. 220-272]. That evidence established the claim for the vessel and cargo.

(9) The object of filing of a claim is merely to give the claimant *persona standi in judicio,* the standing of a party in this proceeding.

United States v. 422 Casks of Wine, 26 U. S. (1 Peters) 547, 549.

(10) The claim is nothing but a statement of the party's right in the property, and its sole purpose is to show his right to oppose the libel.

The Two Marys, 12 Fed. 152, 154.

POINT 24.

The Finding That the Cargo Did Not Come Within the Jurisdiction of the Trial Court in This Proceeding Is Against Law and Erroneous.

The trial court found as a fact that the vessel was *loaded* with cargo and was seized on the high seas by an officer of the Coast Guard at a place within the jurisdiction of the court [Find. I, R. pp. 311-312]; that she was towed to the Coast Guard Base [Find. II, R. p. 312]; that while there, the Collector of Customs adopted said seizure [Find. III, R. p. 312], and as a conclusion of law found that the cargo did not come "within the jurisdiction of this court" [Con. I, R. p. 319]. Appellant assigned that as error [Error 77, R. p. 347].

The conclusion of law that the cargo did not come within the jurisdiction of the court, presumably, is based upon the finding of fact made that the U. S. Marshal did not "arrest or attach the cargo" [Find. VIII, R. p. 314]. Assuming that was so, that did not justify the trial court to make said conclusion of law.

The Assistant Collector, Salter, *admitted* in the trial court that after the Collector of Customs adopted said seizure, *he* removed the cargo from the vessel and placed it in a warehouse for safe keeping [R. pp. 236, 237]. Thereafter this proceeding was instituted [R. pp. 9, 241] against the *cargo* and vessel [R. pp. 5-13, 25-29].

Section 605 of the *Tariff Act* of 1930, 46 U. S. Stat., Part 1, page 754, provides that when a vessel or merchandise is seized, it *"shall be placed and remain"* in the custody of the Collector of the district in which the seizure was made to *"await disposition according to law"*.

Section 934 of the *Revised Statutes*, 28 USCA §747, reads as follows, to-wit:

> *"All* property *taken* or *detained* by *any* officer of other person, under authority of any revenue law of

the United States, shall be irrepleviable, *and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.*" (Italics ours.)

The section quoted in the context "refers to the period before libel filed and arrest, since the goods would be *in custodia legis after that in any event*".

Standard Carpet Co. v. Bowers, 284 Fed. 284.

The section last cited applies to a vessel.

Lima v. Bidwell, 182 U. S. 1, 179, 180.

A seizure made by a prohibition agent.

In re Behrens, 39 F. (2d) 561, 563.

A seizure of intoxicating liquors.

Rothman v. Campbell, 54 F. (2d) 103, 106.

Seizure of an automobile.

United States v. Gowen, 40 F. (2d) 593, 598.

And in an admiralty proceeding.

The Whippoorwill, 52 F. (2d) 985, 989.

"The jurisdiction of the court was secured by the fact that the *res* was in the possession of the prohibition director when the libel was filed."

Dodge v. United States, 272 U. S. 530, 532.

The rule in admiralty is that in a libel proceeding *in rem* "it is necessary that the thing should be actually or *constructively* within the reach of the court. It is actually within its possession when it is submitted to the process of the court; *it is constructively so, when, by a seizure, it is held to ascertain*" by a judicial decree.

The Brig Ann, 13 U. S. (9 Cranch.) 289, 291*;
The Fideliter, 1 Abb. U. S. Report 577.

The rule last referred to and the cases last cited were under the old statute, but under R. S. §934, 28 USCA §747, when property is taken or detained by an officer under the revenue law, it is deemed in *actual* custody of the law, which means the court, and subject, "*only to the orders and decrees of the courts*".

In the instant case, the trial court acquired jurisdiction over the *cargo* by the fact that it was seized by an officer of the Coast Guard and then taken into actual possession by the Collector of Customs who was by statute designated as its legal *custodian* for the court pending its adjudication. When the Collector of Customs, he took possession of the cargo, it was, in contemplation of law, in the custody of the court; and he remained as much responsible to the court for the cargo, and as much bound to obey its decrees and orders, "*as the marshal is, as to property confided to his care. The collector is in fact quoad hoc the mere official keeper for the court.* See *Smart v. Wolff*, 3 Term R. 323."

Burke v. Trevitt, 4 Fed. Cas. No. 2,163.

The jurisdiction which the trial court acquired over the cargo was for a *limited* purpose, to the extent only to adjudicate that the seizure was unlawful.

Cook v. United States, 288 U. S. 102.

The conclusion of law made by the trial court that the cargo "did not come within the jurisdiction of this court" [Con. I, R. p. 319] is contrary to §605 Tariff Act of 1930, 46 U. S. Stat., Part 1, page 754, and R. S. §934, 28 USCA §747, and is therefore erroneous.

POINT 25.

The Finding That the Cargo Did Not Come Within the Jurisdiction of the Trial Court Is Inconsistent With the Finding That He Had Jurisdiction of This Proceeding and Is Erroneous.

The trial court found as a conclusion of law that the cargo did not come within his jurisdiction in this proceeding [Con. I, R. p. 319], and that he had jurisdiction of this proceeding [Con. II, R. p. 319]. Appellant assigned that as error [Errors 77, 78, R. p. 347].

These conclusions are inconsistent. If he had jurisdiction of this proceeding it necessarily follows that the cargo came within his jurisdiction. The libel is against the cargo and vessel [R. pp. 5-13, 25-29]. It is immaterial that Dwight made separate reports [R. pp. 214-216, 219-222]. It is undisputed that there was but *one* seizure on the high seas, namely, the vessel and the cargo on board at the time. *"The seizure and the taking into port necessarily include the cargo and persons on board."*

Ford v. United States, 273 U. S. 593, 610.

POINT 26.

The Finding That the Vessel Was Not Entitled to Fly the Japanese Flag Is Without a Scintilla of Evidence to Support It and Is Against Law and the Assignment of Error to That Finding Presents Error.

The trial court found as a fact that the vessel "was not entitled to fly the Japanese flag" [Find. XVI, R. p. 316]. The appellant assigned that as error [Error 71, R. p. 345].

There is not a *scintilla* of evidence in the Apostles on Appeal proving or tending to prove that the vessel was not entitled to fly the Japanese flag.

The only evidence on that branch of the case is the testimony of Kakichi Asawa, libelant's witness. He testified that he was the Vice Consul of Japan [R. p. 126]; that he did not study the laws of Japan with reference of registering, licensing or documenting of vessels [R. p. 126] and that he did not know the laws of Japan with reference thereto [R. pp. 126-127]. He produced a book which he said contained the laws concerning Japanese boats written in Japanese language [R. p. 127]. He produced another book which he said contained registered ships in Japan [R. p. 130]. The book of laws stated that ships must be registered and their names cannot be changed [R. pp. 129-130]. He said that he made no special study concerning that matter [R. p. 148]. He said that *"other rules of our Government must make protec-*

tion of the Japanese subject and the Japanese vessel when they are out of the country" [R. p. 148]. It is very obvious that the evidence does not support the finding of fact that the vessel in question was not entitled to fly the Japanese flag.

It is significant to note that the U. S. Attorney, the proctor for libelant called the trial court's attention to the *"exchange of notes"* attached to said Convention [R. p. 155]. The material part thereof reads as follows (46 U. S. Stat., Part 2, p. 2449), to-wit:

> "I. That the term 'private vessels' as used in the Convention signifies *all* classes of vessels other than those owned or controlled by the Japanese Government and used for Governmental purposes, for the *conduct of which the Japanese Government assumes full responsibility.* * * *" (Italics ours.)

It has long ago been definitely settled that "exchange of notes" ratified *"is a part of the treaty and is binding and obligatory as if it were inserted in the body of the instrument".*

Doe v. Braden, 57 U. S. (16 How.) 635, 656.

The matter quoted in the context indicates that the Japanese Government expressly extended its sovereign protection to the vessel in question, and appellant thereunder was entitled to fly the Japanese flag.

POINT 27.

The Finding That Appellant Was Not Entitled to Fly the Japanese Flag Was Based on Judicial Knowledge Because That Was Not Pleaded or Proved and That Was Error.

The trial court found as a fact that the vessel "was not entitled to fly the Japanese flag, and did not have a national certificate, nor provisional national certificate, of the Japanese Government" [Find. XVI, R. p. 316]. Appellant assigned that as error [Error 71, R. pp. 345-346].

That finding presumably is based upon the laws of *Japan.* The libelant did not plead nor did he introduce in evidence the laws of Japan.

The rule is well established in courts of admiralty that it will *not* take judicial notice of a law of a foreign country unless it is pleaded and proved.

Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 445;

Coghlan v. So. Carolina R'd Co., 142 U. S. 101, 114;

Dainese v. Hale, 91 U. S. 13, 20;

Talbot v. Seeman, 5 U. S. (1 Cranch.) 1, 38;

Panama Elec. R. Co. v. Moyers, 249 Fed. 19, 20.

That is the prevailing rule in Federal Courts, applicable to other class of cases.

The Hanna Nielson, 25 F. (2d) 984, 987;

The City of Atlanta, 17 F. (2d) 308, 311;

The Vedas, 17 F. (2d) 121, 122.

The underlying reason for the rule stated is that "it is a question of fact to be alleged and proved".

The Hanna Nielson, 25 F. (2d) 984, 987.

The rule stated applies with equal force to a case where the trial court is familiar with the jurisprudence of a foreign country. That, as a matter of law, does not authorize him to take judicial notice of the laws of that country.

The case of *Panama Elec. Ry. Co. v. Moyers,* 249 Fed. 19, is directly in point. In that case the court per Batts, J., said at page 21:

> "It is sought to excuse introduction of evidence of the law of Panama on the ground of familiarity of the trial judge with the jurisprudence of that country. Familiarity of the trial judge with the facts of the case being tried before him does not render unnecessary the introduction of evidence. It is quite possible that the trial judge could have qualified as an expert in the laws of Panama; his testimony with reference thereto would, in that event, have been admissible, but he was not called upon to testify."

POINT 28.

The Trial Court Decided This Case Upon the Doctrine Lex Loci Whereas It Is Governed by the Doctrine Lex Fori and That Was Error.

The trial court found that appellant "was not entitled to fly the Japanese flag", and that he did not have a national or a provisional national certificate of the Japanese Government [Find. XVI, R. p. 316]. Appellant assigned that as error [Errors 71, R. pp. 345-346].

The said finding impliedly found that the laws of Japan required appellant to procure a national or a provisional national certificate before he could fly the Japanese flag.

The rule is settled that in a suit relating to a transaction on the high seas, a court of admiralty will administer justice according to the law of the United States, unless a foreign law is pleaded and proved.

The Scotland, 105 U. S. 24, 29.

The libel of information did not plead the laws of Japan [R. pp. 5-9, 25-29], nor was it proved at the trial.

The law of the forum governs all matters of procedure relating thereto.

Willard v. Wood, 164 U. S. 502, 518;
1 *C. J.* 984, §92, Note 18.

It is elementary that the action is regulated *"solely and exclusively by the law of the place where the action is instituted".*

Dulin v. McCaw, 39 W. Va. 721, 731.

The *lex fori* governs "the admissibility of evidence".

Thomas v. Western Union Tel. Co., 25 Tex. Civ. A. 398, 400.

"By the law of this court, *the lex fori,* the competency of evidence in a proceeding before it, must be determined", and not that of foreign country.

The City of Carlisle, 39 Fed. 807, 816.

"The party who brings a suit is master to decide what law he will rely upon."

The Fair v. Kohler Die etc., Co., 228 U. S. 22, 25.

In the case at bar, the libelant presumably decided to rely upon the laws of the United States because he did not plead the laws of Japan.

Moreover, the said Convention provides that when a private vessel is seized on the high seas, it must be taken into a port of the United States for *"adjudication in accordance with such laws"*.

46 *U. S. Stat.* 2446-2449.

POINT 29.

The Finding That the Vessel Did Not Fly a Flag Did Not Affect Appellant's Right to the Benefits of the Treaty and Convention and the Refusal to Find That the Nationality of the Vessel Was That of Her Owner and Not of the Flag She Flies Was Error.

The trial court found as a fact that the vessel did not fly the Japanese flag [Find. XVI, R. p. 316]. Appellant requested the trial court to find [R. p. 190] as a conclusion of law that the flying of a flag is merely "notice" of her nationality and not "evidence of that fact" [Con. R, R. p. 205], and that the failure to fly a flag "did not justify her said seizure" [Con. S, R. p. 205] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 71, R. p. 345; 49, R. p. 341; 50, R. p. 341].

The flag is the superficial evidence of nationality of a vessel.

The Rothersand (1914), P. 251.

> "A flag is emblematic of the sovereignty of the power which adopts it."

Ruhstrat v. People, 185 Ill. 133, 145.

The flying of a flag is merely notice to which nationality the vessel belongs.

United States v. Brune, 24 Fed. Cas. No. 14,677.

A flag on a mast is merely notice that the master intends that the law of the flag regulate contracts.

Ruhstrat v. People, 185 Ill. 133, 144.

The "flag" of a vessel and its "ownership" may be proved by *parol* evidence or by any other competent evidence.

United States v. Holmes, 18 U. S. (5 Wheat.) 412;
United States v. Inbert, 26 Fed. Cas. No. 15,438;
United States v. Seagrist, 27 Fed. Cas. No. 16,245;
Regina v. Bjornsen, 10 Cox C. C. (Eng.) 74.

The flag is not conclusive of the vessel's nationality.

The Hamborn (1919), A. C. 993;
The Proton (1918), A. C. 578.

The case of *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.,* 10 Q. B. D. 521, was an action brought for loss of goods through a collision between the vessel of Willem Croon-Prins der Nederlander and the Atjeh. Both ships were registered in Holland and carried the Dutch flag. Both ships belonged to English companies. The question before the court was whether or not the flying of the Dutch flag under these circumstances made them Dutch ships. The court in an opinion per Brett, *L. J.,* said at page 535:

> "* * * The question is, whether the mere fact of obtaining a register in Holland and carrying the Dutch flag makes her a Dutch ship. It is absurd to suppose that the mere fact of carrying the Dutch flag makes her a Dutch ship. Pirates carried the flag of every nation, but they were hanged by every nation notwithstanding. To carry false papers was an ordinary mode of evading the laws of war, but nobody ever supposed that the mere fact of carrying a foreign neutral flag and having papers of a foreign

neutral country would cause the ship to be considered as the ship of the nation whose flag and papers she carried. * * *."

The case of *The Tommi* (1914), P. 251, was a seizure of the vessel "The Tommi". Her owner was the Norddeutsche Kraftfutter Gesellschaft, a German company. She left Danzig, laden with molasses, consigned to an English company. While she was in transit, her owner sold her to the Sugar Fodder Company, Limited, an English company. She arrived at Gravesend on August 5, 1914. On August 4, 1914, England declared war on Germany. The collector of customs at Gravesend seized her as a prize of war. The Sugar Fodder Company, Limited, claimed her as owner. One of the questions involved was, who was her owner? The High Court of Justice, Probate, Divorce and Admiralty Division, speaking through Sir Samuel Evans, president, said at page 256:

"* * * It does not matter whether the flag was actually flying, whether it was hoisted, or whether it was at the mast when the ship was captured; the question is what flag she was entitled to fly, and in my view there is no distinction on this part of the case between the case of a ship captured at sea and the case of a ship seized in port. * * *."

The case of *Regina v. Bjornsen,* 10 Cox C. C. (Eng.) 74, Leigh & Cave's Crown Cases (1865), 545, is also in point. In that case the defendant was indicted for murder committed on board of the barque "Gustav Adolph" on the high seas at a point about 25 days' sailing from Pernambuco and about 200 miles nearest to land. The

question involved was whether the barque was a British ship. She was built in Kiel Duchy of Holstein in 1864. She was sailing under the *English* flag on June 21, 1864. The crew was told before sailing that Mr. Rehder was the sole owner. A certified copy of the register of the barque was put in evidence. Documentary evidence was introduced showing that Paul Ellers was in partnership with Mr. Rehder in that vessel, and that Mr. Ellers was not a British citizen. The jury acquitted the defendant of murder and found him guilty of manslaughter. The trial judged reserved three questions for determination which were thereafter heard by the entire members of the court, and they quashed the conviction. Each of the judges wrote a separate opinion.

Erle, *C. J.*, said:

> "I am of opinion that this conviction cannot be sustained. The question in this case is, whether there is jurisdiction to try in England a man who has committed a crime of manslaughter thousands of miles away from British territory; and the principle relied on is that the ship is British, and so was in the nature of British territory. The whole case turns on whether the ship was British or not. There is *prima facie* evidence that it was British for the statement in the register that the owner resided in London and the fact that the ship sailed under the British flag amount to that. It has been proved, however, that the owner is an alien; and the question comes to this—whether the presumption arising from the

flag and the residence of the owner is rebutted by proof that the owner is not a natural-born British subject, or whether the effect of that proof is met by the presumption that the owner has not violated the laws of this country by having falsely represented himself to be qualified to own a British ship. I am of opinion that the presumption arising from the residence of the owner is rebutted by the proof that that owner was not a natural-born British subject, and that I cannot draw the reference that he has been naturalized or has received likewise of denization. My judgment is limited to the question of evidence, and does not involve any question of general or international interest."

Blackburn, *J.*, said:

"* * * The point, therefore, is this—was the ship British or not? I agree that its sailing under the British flag, coupled with the fact that the owner resided in London, amounted to *prima facie* evidence that the ship was British. Here, however, there is proof that the owner was an alien; and the mere fact that an alien is resident in London does not make him a British subject. Such a person merely owes a temporary allegiance to the British Crown (The Alien Chief (A)) so long as he remains in this country; and it would be absurd to say that the temporary residence of an alien in this country made his ship a part of the British territory. * * *."

POINT 30.

The Finding That the Vessel Was Not Registered in Japan Did Not Affect Her Nationality Because Her Nationality Is Nevertheless That of Her Owner, and the Refusal to Find That Was Error.

The trial court found that the vessel was not entitled to fly the Japanese flag [Find. XVI, R. p. 316]. The appellant requested the trial court to find [R. p. 190] as a conclusion of law that the nationality of the owner of the vessel and not the flying of the flag determines her nationality [Con. T, R. p. 205] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 71, R. pp. 345-346; Error 51, R. p. 342].

The rule in this country is well settled that the nationality of a vessel not registered with the government is that of her owner.

In the case of *The Chiquita,* 19 F. (2d) 417, the vessel "Louis Pol" was built in Scranton, Mississippi. Subsequently her name was legally changed to "Patsy", under which she was granted a license to engage in coastwise trade. Thereafter the license was surrendered at Miami, Florida, and she departed for Nassau. She was there seized to enforce a maritime lien and was under a judgment sold and purchased by a British subject. Thereafter her name was changed to "Aesop" and given British registry. Thereafter she was seized off the coast of Mississippi, libeled as British vessel with violation of the

customs laws and subsequently released in that proceeding. Thereafter she underwent repairs at Mobile, Alabama. Subsequently she was sold to Carlos Armador, a citizen of Honduras. Her name was changed to "Chiquita". She was seized about 35 miles off the Louisiana coast. A libel of information was filed alleging her to be an American vessel, and seeking her forfeiture and that of her cargo. The trial court rendered judgment decreeing forfeiture (18 F. (2d) 673) and the judgment was upon appeal reversed. The court per Foster, *J.*, said at page 418:

> "* * * It is immaterial that the Chiquita may have lost her British registry, and has not yet acquired permanent Honduran registry. * * * If she is not properly registered, her nationality is still that of her owner. Moore, International Law, Vol. 2, pp. 1002-1009. * * *."

See, also:

58 *C. J.* 30, Note 4.

The rule in England is well settled that the nationality of a vessel not duly registered with the government is that of her owner.

> *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.*, 10 Q. B. D. 520, above quoted;
>
> 58 *C. J.* 30, Note. 4.

POINT 31.

The Finding That Appellant Was "Domiciled" in the United States Is Without a Scintilla of Evidence to Support It and Is Against the Undisputed Evidence and Is Contrary to Law.

The trial court found as a fact that appellant "was domiciled in the United States" [Find. XIII, R. p. 315]. Appellant requested him to find [R. p. 190] that his domicile was "in the City of Nishinomiya in the Province of Hyogo, Japan", and that he was sojourning temporarirly in the United States [Find. XXII, R. pp. 196-197], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 69, R. p. 345; 20, R. p. 333].

There is not a scintilla of evidence proving or tending to prove that appellant "was domiciled in the United States". The evidence bearing on that branch of the case is that appellant is married and lives with his wife and child at "No. 90 Ikadcho Street" in said city and Province of Japan; that he entered this country "May 13, 1929" under "a passport" [R. p. 263] and he is staying at "241-A Albicore Street" [R. p. 264], that his "permanent" home is in Japan, and is "temporarily" living at San Pedro [R. p. 264]. There is not another iota of evidence in the Apostles on Appeal, and we challenge the libelant to contradict this statement.

The trial court, at the trial, ruled "what is or is not a domicile, under this proceeding becames a question of *law*" [R. p. 263]. But the trial court made instead a finding of *fact* that appellant "was domiciled in the United States" [Find. XIII, R. p. 315]. That finding is clearly erroneous.

The passport was merely permission to enter and did not affect his status as an alien in the United States.

The status of such alien does not change by a long residence.

Ex parte Crawford, 165 Fed. 830;
Ehrlich v. Weber, 114 Tenn. 711.

The domicile of a married man is presumed to be at the place where his wife or family resides.

Gaddie v. Mann, 147 Fed. 955, 956;
Catlin v. Gladding, 5 Fed. Cas. No. 2,520;
The Thomas Fletcher, 24 Fed. 375, 378;
Hylton v. Brown, 12 Fed. Cas. No. 6,981.

A person may have several homes, only one of which can be his legal domicile.

Boyd's Exer. v. Commonwealth, 149 Ky. 764, 766;
The Thomas Fletcher, 24 Fed. 375, 378.

In order to constitute a domicile there must be present the *animus manendi* to remain permanently.

Matter of Roberts, 8 Paige Ch. (N. Y.) 519.

A man does not lose his domicile because he is engaged in business in another country.

State v. Schnyder, 182 Mo. 462, 518.

A subject of the Empire of Japan cannot acquire a domicile in the United States because he cannot enter this country except under certain conditions.

A Japanese born in Japan whose parents were Japanese is ineligible to become a citizen by naturalization.

8 *USCA*, §359.
Morris v. California, 291 U. S. 82, 85.

POINT 32.

The Finding That Appellant Was "Domiciled" in the United States Did Not Affect His Nationality.

Appellant requested the trial court to find as a fact that [R. p. 190] his domicile was in Japan, and that he temporarily resided in the United States [Find. 22, R. pp. 196-197] which he refused with an exception to appellant [R. p. 208]. The trial court instead found that appellant "maintained a home and was domiciled in the United States" [Find. XIII, R. p. 315]. Appellant assigned that as error [Errors 20, R. p. 333; 69, R. p. 345].

A change of domicile merely, does not "effect a change of allegiance".

State v. Jackson, 79 Vt. 504, 516.

The mere protracted residence abroad does not effect denaturalization.

In re Lee, 1 Extraterr. Cas. 699.

The nationality of an alien does not change by a long residence in the United States.

Santovincenzo v. Egan, 284 U. S. 30, 39;
Ex parte Crawford, 165 Fed. 830;
Ehrlich v. Weber, 114 Tenn. 711, 717.

POINT 33.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because the Collector of Customs Entered Her as a Foreign Vessel and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that the Collector of Customs entered the vessel in his records as an alien Japanese vessel [Finds. 2, 3, 4, R. pp. 191-192], and as a conclusion of law that said entry precluded the libelant from disputing her nationality [Con. E, R. p. 202] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 2-4, R. pp. 328-329; 36, R. p. 339].

The *undisputed* evidence is that the Collector of Customs, Marine Department, entered the vessel as a Japanese alien vessel [R. pp. 141, 142, 143]. The trial court held that that evidence was *"persuasive"* [R. p. 151]. He found that as a fact in his order dismissing the libel [R. p. 161]. He made the same finding in the findings of fact [Find. 13, R. p. 165] and found as a conclusion of law that the libelant thereby well knew that she was an alien owned vessel [Con. B, R. p. 167] on which the decree was recorded and which he subsequently vacated [R. pp. 176-177]. And, yet, the trial court refused to make substantially the same finding, although the evidence on that issue was undisputed.

The refusal to find said facts and conclusions of law did not change the legal effect of the undisputed evidence.

The rule is settled that the Federal Government may be estopped by the acts or conduct of its officers and agents.

Walker v. United States, 139 Fed. 409, 413, Aff'd. 148 Fed. 1022;

United States v. Stinson, 125 Fed. 907, Aff'd. 197 U. S. 200;

United States v. Willamette Valley etc., 54 Fed. 807, 811;

State v. Milk, 11 Fed. 389, 397.

POINT 34.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because the Collector of Customs Demanded and Collected Light Money From the Vessel, and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact that [R. p. 190] the Collector of Customs demanded and received light money from the vessel from the date she was built to the date of seizure [Find. 7, R. pp. 190, 193], and as a conclusion of law that that precluded the libelant from disputing the fact that her nationality is Japanese [Con. F, R. pp. 202-203] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Errors 7, R. pp. 329-330; 37, R. p. 339].

The *undisputed* evidence is that the Collector of Customs collected "light money" from the vessel from July 12, 1924, to March 1, 1933 [R. p. 143]. The trial court held that that evidence was "*persuasive*" [R. p. 151]. In his order dismissing the libel, he found as a fact that "said

vessel was subjected to and required to pay 'light' taxes at all times since its construction" [R. p. 161], and made the same as a finding of fact [Find. XIII, R. 6. 165], and as a conclusion of law found that the libelant well knew that the said vessel was an alien-owned vessel [Con. B, R. p. 167] on which the decree was recorded and which he subsequently vacated [R. pp. 176-177], and, yet, the trial court refused to make substantially the same findings although the evidence on that issue was undisputed.

It is well settled that the Federal Government may be estopped by the acts or conduct of its officers and agents.

Point 33, p. 103, *supra.*

POINT 35.

Libelant Was Estopped From Disputing the Nationality of the Vessel Because of the Judgment in the Criminal Action and the Refusal to Find That Was Error.

Apellant requested the trial court to find [R. p. 190] that the criminal action terminated in a judgment in his favor [Find. 29, R. pp. 199-200], and as a conclusion of law that that judgment precluded libelant from disputing the nationality of the vessel as being a Japanese vessel [Con. X, R. p. 206], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 27, R. pp. 335-336; Error 55, R. p. 342].

The *undisputed* evidence is that appellant and his crew were indicted for alleged offenses arising out of the seizure involved in this libel. They appeared *specially* and

moved to quash said indictment upon the ground their arrests were in violation of the said Convention, and that motion was denied. Thereafter, appellant moved for a rehearing of said motion based on the order dismissing the libel, the evidence taken on the motion to quash the libel in *this* proceeding, and that motion was granted and a judgment entered dismissing said criminal action [R. p. 259].

The main issues in the criminal action were whether or not the vessel (1) was a Japanese vessel and (2) the seizure was in violation of the said Treaty and Convention. The trial court must have found said issues against the libelant as otherwise he would not have quashed said indictment.

The rule in the Federal Courts is that where the *same* issue is involved in a criminal action, it cannot be again litigated "as the basis of any statutory punishment denounced as a consequence of the existence of the facts".

Coffey v. United States, 116 U. S. 436, 444;

Sierra v. United States, 233 Fed. 37, 41;

United States v. Rosenthal, 174 Fed. 652;

United States v. A Lot of Precious Stones and Jewelry, 134 Fed. 61, 63.

That rule also applies where the decision was rendered in a case which was begun by motion.

Am. Surety Co. v. Baldwin, 287 U. S. 156, 166.

POINT 36.

The Presence of the Vessel Within 12 Miles From Coast Did Not Justify Her Seizure Because It Was Not a Violation to There Take Bearings in a Fog and the Refusal to Find That Was Error.

Appellant requested the trial court to find as a fact [R. p. 190] that she was at the place of seizure for the purpose of taking bearings in order that her master ascertain his whereabouts [Find. 18, R. p. 196] and as a conclusion of law that neither violated any law or statute [Con. Y, Z, AA, BB, R. pp. 206-207] which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 16, R. p. 332; Errors 56-59, R. pp. 342-343].

The *undisputed* facts are that appellant pleaded as an affirmative defense that he was at the place of seizure to take bearings, and did not intend to go to the United States [R. pp. 20-21]. He testified that there was a *fog* on the high seas and he went to that place to ascertain his whereabouts [R. pp. 41-42] which was 19 miles from the coast [R. p. 44] and did not intend to land the cargo [R. pp. 271, 279, 282]. He was corroborated by the Government's witnesses who *admitted* that at that time there was a *fog* there and "visibility was very poor" [R. pp. 77, 82, 86, 87, 88, 89] so that a sextant could not be used [R. p. 82], and the top of Catalina Island could not be seen [R. p. 89]. The trial court, in commenting on appellant's evidence said, *"that the defendant owner*

of the boat did not know where his boat was" [R. p. 100] which was appellant's contention.

It was not a violation of law for a vessel to enter a port due to stress of weather or other necessity.

§586, *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 749, 19 USCA, §1586;

The Louise F., 13 F. (2d) 548;

The Mary, 16 Fed. Cas. No. 9,183;

The Cargo Lady Essex, 39 F. 765, 767;

Peisch v. Ware, 8 U. S. (4 Cranch.) 347, 361, 363;

United States v. 1,197 Sacks of Intoxicating Liquor, 47 F. (2d) 284, 285.

POINT 37.

The Possession of the Cargo Within 12 Miles From the Coast Did Not Justify the Seizure Because It Was Not Engaging in Trade, Having Transferred the Cargo From a Vessel in Distress on the High Seas and the Refusal to Find That Was Error.

The trial court found as a fact that the "vessel was engaged in trade" [Find. XXI, R. p. 318]. Appellant requested the trial court to find [R. p. 190] as a conclusion of law that neither he nor his vessel violated the statutes or laws [Con. Y, Z, AA, BB, R. pp. 206-207], which he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 76, R. p. 347; Errors 56-59, R. pp. 342-343].

The cargo was transferred on the high seas from a vessel in distress.

Point 36, pp. 107-108, *supra.*

The possession of transferred cargo on the high seas from a vessel in distress did not constitute a violation of the statutes.

United States v. 1,197 Sacks etc., 47 F. (2d) 284, 285;

The Pilot, 36 F. (2d) 250.

The only evidence that the vessel was engaged in "trade" is that the cargo was found on board at the time of the seizure. That was not sufficient to prove that the vessel was "engaged in trade" within the meaning of the statute.

The phrase "engaged in trade" implies more than *one* act, and the rule is settled that one *act* does not constitute "engaged in trade" as a matter of law.

The Chiquita, 44 F. (2d) 302, 304;

The Pilot, 36 F. (2d) 250, 252;

The Swallow, 23 Fed. Cas. No. 13,666;

The Willie G., 30 Fed. Cas. No. 17,762;

Morningstar v. State, 135 Ala. 66, 67;

Grant v. State, 73 Ala. 13, 14;

Nelson v. Johnson, 38 Minn. 255, 257.

POINT 38.

The Failure to Produce a Manifest Was Not a Violation Because Demand Was Made Beyond Government's Jurisdiction and the Vessel Was Not Bound to the United States and the Refusal to Find That Was Error.

The trial court found as a fact that the failure to produce a manifest for the cargo was a violation [Find. XX, R. p. 318]. Appellant requested the trial court to find as a conclusion of law [R. p. 190] that the vessel did not violate any statute or law that would subject her to penalty [Cons. Y, Z, AA, BB, R. pp. 206-207], and he refused with an exception to appellant [R. p. 208]. Appellant assigned that as error [Error 75, R. p. 347; Errors 56-59; R. pp. 342-343].

The appellant is a subject of Japan and the nationality of the vessel is deemed that of her owner (Point 2, pp. 36-37, *supra*). The U. S. Attorney *admitted* that the vessel was *"seized more than one hour's sailing distance from shore"* [R. p. 150]. The Government had no power to make the seizure (Point 3, pp. 38-46, *supra*), hence the officer of the coast guard had no *power* to demand the manifest.

United States v. 1,197 Sacks etc., 47 F. (2d) 284, 285;

The Pictonia, 20 F. (2d) 353, 354.

The vessel was not bound to the United States [R. pp. 271, 277, 279, 282]. She was at the place of seizure to take bearings in a fog and her presence there was not a violation (Point 36, pp. 107-108, *supra*). The failure to

produce a manifest was not a violation justifying the seizure.

The case of *United States v. 1,197 Sacks of Intoxicating Liquors*, 47 F. (2d) 284, is directly in point. In that case, the Fannie Power was in distress and transferred the cargo consisting of liquor, to "John N. Hathaway". The latter was seized with the liquor on board. One of the grounds of forfeiture was that her master failed to produce a manifest, and it was held that in such case, the statute did not require a manifest. The court per Thomas, *J.*, said at page 285:

> "The libelant further claims that the cargo is subject to forfeiture because of the fact that since there was no manifest, the master of the boat is considered the consignee of the cargo. The decisions dispose of this contention adversely to the libelant, and the courts have held that a manifest is required only where a vessel is bound to the United States, and that no official of the Government has the right to demand a manifest beyond 12 miles of the coast of the United States. See, The Pictonian (C. C. A.), 20 F. (2d) 353. The master can only be considered the consignee where it appears that the cargo was under his control. In the instant case the evidence is direct and persuasive that the cargo was under the control of the claimant's son, and that the master had no supervision of the control of the cargo. Besides, the fact that the Power was in distress is sufficient answer to the return claim. * * *."

POINT 39.

The Finding That the Vessel Was Seized Within Four Leagues From the Coast of the United States Is Against Libelant's Own Evidence and the Assignment of Error to That Finding Presents Error.

The trial court found as a fact that the vessel was seized between 10 and 11 miles from the coast of the United States [Find. I, R. p. 316], and as a conclusion found that it occurred within 4 leagues [Con. II, R. p. 319]. Appellant assigned that as error [Error 78, R. p. 347].

The Government's witness Dwight [R. p. 73], testified that when he first observed the vessel, she was "a mile and a half" from his boat [R. pp. 80-81]. He said that she was at that point 10 miles from San Juan Point [R. pp. 77, 81]. He testified that he arrived at the figures by "my dead reckoning position" [R. p. 77]. This position he claimed he arrived at "was by dead reckoning running from San Clemente Island" [R. p. 77]. He said "I couldn't see any land marks whatsoever to determine the exact position. That is the reason I took no bearings with reference to land marks, because I could see no land marks to take position from" [R. p. 77]. He gave as a reason for that "It was hazy at the time" [R. p. 80]. He said, "due to hazy weather, and visibility was very poor" [R. p. 77].

Assuming, but not admitting, that Dwight's testimony is the correct version of the distance, a careful consideration would show that the seizure was made *more* than 4 leagues from the coast of the United States. It will be recalled that he testified that when he first sighted the vessel, she was at a distance of about a mile and a half from where he encountered her [R. p. 81]. The weather was hazy and "visibility was very poor" [R. p. 77], and he could not determine "the exact position" [R. p. 77]. However, he must have traversed in her direction at least one mile when he first sighted her. Adding the one mile to the 10 miles which he said he traveled when he first sighted her, that would be 11 *nautical* miles. 11 nautical miles equals 11.00, and multiplying that at the rate of 6,080 feet per nautical mile, equals 66,880 feet. In order to ascertain how many "leagues" is in the 66,880 feet, the item above referred to, it is necessary to ascertain the number of feet per one Statute or English mile. One Statute or English mile is 5,280 feet.

> *Wrinkles on Practical Navigation,* First Ed., Ch. 2, pp. 4-7.

Converting the 66,880 feet into Statute or English miles is 5,280 feet. Converting the 66,880 feet into Statute or English miles equals 12.66 Statute or English miles. Converting the 12.66 Statute or English miles into leagues equals 4 leagues *plus 66/100 miles.* This computation shows that the trial court erred in his conclusion and finding that the seizure was made within 4 leagues.

The measures of England were brought to the Colonies and became part of the common law of the United States.

Dwight, etc., v. Am. Ore Recl. Co., 263 Fed. 315, 317;

Thompson v. Dist. of Columbia, 21 App. D. C. 395, 402.

"In English-speaking countries a league is estimated at 3 miles."

Bolmer v. Edsall, 90 N. J. Eq. 299, 307.

The statute or English mile consists of 5,280 feet."

Wrinkles on Practical Navigation, 1st Ed., Ch. 2, pages 4-7.

A marine league is equivalent to 3 geographical miles or 2 sea miles.

Rockland, etc. SS. Co. v. Fessenden, 79 Me. 140, 148.

POINT 40.

The Collector of Customs Had No Power to Destroy the Cargo and the Conclusion of Law That It Was Rightfully and Lawfully Disposed of by Him Is Against Law and Is Erroneous.

The trial court found as a fact that the Collector of Customs *destroyed* the cargo under the provisions of Sections 607 and 608 of the Tariff Act of 1930 [Find. VI, R. pp. 313-314], and as a conclusion of law, found that the cargo was "rightfully and lawfully disposed of" by him [Con. I, R. p. 319].

Appellant assigned that as error [Error 66, R. p. 345; Error 77, R. p. 347].

Finding of fact VI [R. pp. 313-314] is to the effect that the Collector of Customs, upon complainance with the provisions of Section 608 of the Tariff Act of 1930 disposed of the cargo by destroying it. That *implies* that Section 608 of the Tariff Act of 1930 authorized and empowered the Collector of Customs to destroy the cargo. This court will in *vain* search that section for such authority, because it does *not* authorize or empower the Collector of Customs to destroy the cargo, and, yet, the trial court, based upon that finding, made a conclusion of law that the Collector of Customs "rightfully and lawfully disposed of" the cargo [Con. I, R. p. 319]. It must be obvious to the court as it is to us that the said finding of fact and conclusion of law is a miscarriage of justice.

The Collector of Customs had no *power* to destroy the cargo for nine reasons, to wit:

(1) The Congress directed that the vessel or merchandise seized "shall be placed and *remain* in the custody of the Collector of Customs in which the seizure was made to *"await disposition according to law."*

§605 *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 754.

(2) The Congress also commanded that if the appraised value of the vessel or merchandise does not exceed $1000.00, the Collector shall cause a notice to be published of the seizure and "the intention to *forfeit* and *sell* the same," in the same manner as merchandise abandoned to the United States is sold. If the appraised value exceeds $1000.00, the Collector must transmit a report of the case to the Attorney for *"institution of the proper proceedings for the condemnation of such property."*

§§607, 608, 609, 610 *Tariff Act* 1930, 46 U. S. Stat., Part I, pp. 754-755.

(3) The Congress further directed that if a "sale or use" of the merchandise be prohibited, "under any law of the United States or of any State," the court, upon the request of the Secretary of the Treasury, may provide in its *decree* of forfeiture that it shall be delivered to the Secretary, who may, in his discretion, destroy its or manfacture it into an article that is not prohibited.

§619 *Tariff Act* 1930, 46 U. S. Stat., Part I, p. 755.

(4) The Government had no power to seize the vessel and its cargo at the place where she had been seized.

46 *U. S. Stat.*, 2446-2449;

Point 3, pp. 38-46, *supra.*

(7) The immunity on the high seas from seizure of the vessel included the cargo and everything on board.

Ford v. United States, 273 U. S. 593, 610.

(8) The Convention provided that in case of a seizure, the vessel must be taken into a port for "*adjudication in accordance with such laws.*"

46 *U. S. Stat.*, 2446-2449;

Point 3, pp. 38-46, *supra.*

(9) The phrase for "*adjudication in accordance with such laws*" contemplated a *trial* before a court of competent jurisdiction.

United States v. Irwin, 127 U. S. 125, 129;

The Scotland, 105 U. S. 24, 29;

Hovey v. Elliott, 167 U. S. 409, 414.

The statutory provisions and the Convention show that the Collector of Customs had *no power to destroy the cargo before a decree was made by a court of competent Jurisdiction.* And, yet the trial court made a conclusion of law that the cargo was "rightfully and lawfully disposed of" by the Collector of Customs under the provisions of Section 607 of the Tariff Act of 1930." Obviously, that conclusion of law is not alone erroneous, but is contrary to and against law.

POINT 41.

Appellant Is Entitled to the Return of the Property Taken From His Possession Under the Unlawful Seizure.

The Government had no power to make the seizure under said Convention between the United States and Japan.

Point 3, pp. 38-46, *supra.*

The Government had no power to make the seizure under the most favored nation clause of said treaty between the United States and Japan.

Point 4, pp. 47-49, *supra.*

It is settled that where property is taken under an unlawful seizure, the person from whom it is taken is entitled to its return.

The Apollan, 22 U. S. (9 Wheat.) 362, 373, 379;
Weeks v. United States, 232 U. S. 383, 398;
Amos v. United States, 255 U. S. 313, 316;
United States v. Porazzo Bros., 272 Fed. 276, 277;
United States v. Burns, 4 F. (2d) 131, 132.

POINT 42.

This Court Should Appoint a Commissioner or Assessor to Hear and Report the Damages Sustained by Appellant Through the Unlawful Seizure.

The libelant admitted that the collector of customs destroyed the cargo after this libel was filed and before its adjudication and it will not be denied that the libelant sold the vessel under the decree appealed from an after the appeal was taken.

The Collector of Customs took possession of the cargo as *"quoad hoc* the mere official keeper for the court."

Burke v. Trevitt, 4 Fed. Cas. No. 2, 163.

He was required by statute to *retain* the cargo to *"await disposition according to law."*

§605 *Tariff Act* 1920, 46 U. S. Stat., Part I, p. 754.

The Collector of Customs had no power to destroy the cargo, because the Government had no power to make the seizure.

Point 40, pp. 115-117, *supra.*

The appeal arrested the jurisdiction of the District Court and, thereafter, the court had no power to take any action in the matter without leave of this court.

Baltimore SS. Co. v. Phillips, 9 F. (2d) 902;

The American Shipper, 70 F. (2d) 632, 634.

The court had no power to adjudicate the vessel and cargo, and therefore had no power to enforce its decree, because the Government had no power to make the seizure.

Point 3, pp. 38-46, *supra.*

In a case where the Government had no power to make the seizure, the person from whom the property is taken is entitled to its return.

Point 41, p. 118, *supra.*

Is the appellant to be turned out of this court with a mere idle victory, if he is successful on this appeal? It does not follow that because the cargo was destroyed and the vessel sold, that appellant should be turned out of court with a mere idle victory. He is entitled to redress for the wrongful taking of the property from his possession. This court has the power to righten that wrong.

In the case of *United States v. Thekla,* 266 U. S. 328, the court, per Holmes, J., said at page 339:

> "* * * When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libeled by the United States, were the vessel in other hands, the moral right of the claimant is recognized. * * *"

See, also:

The Western Maid, 257 U. S. 419, 433, 434;
The Siren, 74 U. S. (7 Wall.) 152, 159.

The appeal in an admiralty proceeding is a trial *de novo*.

Point 12, pp. 62-64, *supra*.

The appeal opens the whole case as if both parties had appealed.

Irvine v. The Hesper, 122 U. S. 256, 267.

The libel proceeding is deemed pending until the final determination of the appeal. The court, in the progress of an admiralty suit, in a case where it deems it "expedient or necessary for the purposes of justice," may appoint one or more commissioners or assessors "to hear the parties and make a report therein."

U. S. Sup. Ct. Admiralty Rule 43.

This is a proper case where the court should exercise the discretion and invoke said rule, and appoint a commissioner or assessor to hear and report appellant's damages, in order to prevent a miscarriage of justice, so that appellant should not be turned out of court with an idle victory if successful on his appeal.

It is settled that in a case of unlawful seizure, the person whose property was taken is "entitled to receive from the United States the fullest compensation for their loss and damage."

The Frances Louise, 1 F. (2d) 1006;

The William H. Bailey, 103 Fed. 799;

Irvine v. Hesper, 122 U. S. 256, 267.

The Apollan, 22 U. S. (9 Wheat.) 363, 379.

POINT 43.

The Decree, if Sustained, Will Subject the Government to Refund Over $50,000,000.00 Light Money Collected.

The Apostles on Appeal show an anomalous situation. The Government regarded the nationality of the vessel as Japanese for the purpose of collecting light money, and regarded her nationality as American for the purpose of forfeiture. She cannot be both. If she is an American vessel, the Government had no right to collect light money. If she is a Japanese vessel, the Government had a right to collect light money, but had no right to seize her at the place where she had been seized. If the decree appealed from is sustained, it will subject the Government to refund over $50,000,000.00 "light money" collected, not alone from the vessel in suit but from *thousands* of similar vessels on the Pacific Coast.

POINT 44.

The Refusal to Rule Separately on Appellant's Requests to Find, Was a Violation of the Spirit and Intent of Admiralty Rule 46½.

Appellant requested the trial court to find [R. p. 190], certain specific facts [R. pp. 191-201], and conclusions of law [R. pp. 202-207]. The trial court made an omnibus ruling denying all the requests [R. p. 208]. Supreme Court Admiralty Rule 46½ provides that "the court of first instance shall find the facts separately and state separately its conclusions of law thereon." The object of that rule was to do away with *implied* findings and to facilitate the review of an appeal so that the case may be investigated independent of the facts, lessen the labor of the appellate courts, and lessen the expense of printing unnecessary parts of the record. The rule intended to apply to *proposed* findings as well as the findings made by the court. The refusal of the trial court to rule separately, casts an unnecessary burden on this court, and an unnecessary expense on appellant.

POINT 45.

If Appellant Is Successful on This Appeal He Is Entitled to Recover the Costs in This Court and of the Court Below.

In an admiralty proceeding, when the decree appealed from is reversed in this court, the appellant is entitled to recover the costs of the appeal against the United States.

28 *U. S. C. A.* §870.

James Shewan & Sons, Inc., v. United States, 267 U. S. 86, 87;

United States v. Thekla, 266 U. S. 328, 339;

The Pasadena, 55 F. (2d) 51, 52.

Appellant is also entitled to recover the costs of the court below against the United States.

46 *U. S. C. A.* §743;

James Shewan & Sons, Inc., v. United States, 267 U. S. 86, 87;

The Lily, 69 F. (2d) 898, 900;

The James McWilliams, 49 F. (2d) 1026, 1027;

The Verona, 40 F. (2d) 742, 743.

POINT 46.

Admiralty Rule 1 of This Court Is Obsolete Because It Was Superseded by Statute. It Should Be Repealed to Avoid Confusion and Injustice That May Result.

Admiralty Rule 1 of this Court provides that an appeal from "an interlocutory of final decree" to this court—

> "shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of. * * *"

The said rule was adopted on May 21, 1900 (100 Fed. iii).

The official rules published contains a footnote to the effect that said rule modifies Rule 11 of the General Rules, that a petition on appeal and allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal, and refers to the case of *Kenney v. Louie,* No. 939, "motion to dismiss appeal denied May 6, 1903".

28 USCA §230, approved June 30, 1926, reads in part as follows, to wit:

> "No * * * appeal intended to bring any judgment or decree before a Circuit Court of Appeals for review shall be allowed unless application therefor be duly made within three months * * * ".

The phrase *"any* judgment or decree" means "all" judgments.

3 C. J. 239, §6, Note 57.

That construction was applied to a case involving a removal from a State to a Federal court.

Cochran v. Montgomery County, 199 U. S. 260, 272;

3 C. J. 237, §6, Note 5.

This court may make rules "not inconsistent with the laws of the United States".

28 U. S. C. A. §723.

Rule 1 of the Admiralty Rules of this Court is *inconsistent* with the provisions of 28 USCA, §230, because the rule states that an appeal may be taken to this Court by filing of a notice of appeal and serving a copy thereof on the adverse party, whereas the Statute provides that an appeal cannot be taken as a matter of course, but only in the *discretion* of the Court below.

A subsequent Statute supersedes a prior rule relating to appeals.

Robbins, etc., v. Chesborough, 216 Fed. 121, 122.

> "If there is anything inconsistent with this holding in admiralty rule" it must give way to "the act of Congress."
>
> *The City of Naples,* 69 Fed. 794, 795.
>
> "The rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid."

That ruling was made regarding Rule 22 of this Court. *Davidson Marble Co. v. Gibson,* 213 U. S. 10, 19.

This point is not involved in the instant case, because appellant followed the procedure of the Statute instead of the rule [R. pp. 326, 327, 356]. However, appellant felt that he should call the foregoing to the attention of this court, with a view that said rule may be repealed in order that the members of the Bar be informed to follow the Statute, instead of the rule, to prevent injustice which may result therefrom.

CONCLUSIONS.

It is respectfully submitted that for the foregoing reasons, the decree appealed from should be reversed, and the libel dismissed with costs to appellant of this appeal and costs of the court below, and that this court should appoint a commissioner or assessor to hear and report the damages sustained by appellant by reason of the seizure, and that appellant have judgment against the libelant for the sum to be found due him with costs of the reference, and for such other and further order and relief as to this court may seem meet and proper.

Respectfully submitted,

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Dated March 14, 1935.